Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

—v.—

JAMES F. MARONEY, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE COURT OF OYER AND TERMINER OF ALLEGHENY COUNTY, PENNSYLVANIA

DOCKET ENTRIES

Court of Oyer and Terminer met on Friday, Sept. 27th, 1963, at 9:30 A.M.

PRESENT

Honorable James G. Legnard, Presiding
Honorable Anne X. Alpern

SPECIALLY PRESIDING

Honorable Frank E. Reed	36th Judicial District
Honorable W. C. Sheeley	51st Judicial District
Honorable J. Frank Graff	33rd Judicial District
Honorable Charles G. Webb	4th Judicial District
Honorable John S. Powers	53rd Judicial District

COMMONWEALTH

vs.

RAYMOND LAWSON: FRANK CHAMBERS;
HENRY RAMSEY: JOSEPH JACKSON

No. 78 & 91 June Sessions 1963 True Bill
Judge: Graff
Charge: Armed Robbery; Receiving Stolen Goods
Dist. Atty: Means
Def. Atty: Johnson for Lawson; Blumenfeld for Jackson; Tamburo for Chambers & Ramsey
Pros: Joseph T. Reddington

AND NOW Sept. 27th, 1963, defendants in open Court with counsel plead Not Guilty. District Attorney joins in motion.

Eodie: A jury being called there came Mildred Wilson, Martha Belosh, Stephen Mycka, Robert Braun, Dorothy Bergman, William Stratton, William Cornesky,

Sr., Linda Bodnar, Leo Soeder, Harry Steighner, Violet Zoccke, George Bayer, twelve good lawful men and women dully summoned, returned, elected by ballot, empannelled and sworn who respectfully say:

And now, Oct. 1st, 1963 at the conclusion of the Commonwealth's case in open Court at 78 O&T June 1963 attorneys for defendants Henry Ramsey & Joseph Jackson demurrs to the evidence.

Eodie: In open Court the demurrers as to Henry Ramsey and Joseph Jackson are hereby sustained.

Eodie: And now Oct. 3rd, 1963 the jury at No. 78 June O & T 1963 finds defendants Raymond Lawson & Frank Chambers Guilty see verdict filed,.

Eodie: And now, Oct. 3rd, 1963 at 91 O&T June 1963 the jury returns a verdict of Guilty as to each defendant, see verdict filed.

Eodie: And now Oct. 3rd, 1963 Motions for New Trial to be filed by defendants Lawson, Ramsey & Jackson. Sentence on Chambers deferred until other cases are over. Lawson continued on Bond, others remanded to Jail.

Eodie: And now, Jan. 24, 1964 deft. at 91 June 63 Joseph Jackson present with counsel in open Court, sentenced to pay a fine of 6¼ cents to the Commwth. pay costs of prosecution and undergo an imprisonment of not less than 11½ mos. or more than 23 mos, in the Allegheny County Workhouse and stand committed. Date of last commitment May 22, 1963. Automatic parole.

Eodie: And now, Jan. 24, 1964 deft. Henry Ramsey at No. 91 June 1963 with counsel in open sentenced to pay a fine of 6¼ cents to the Commonwth, pay costs of prosecution and undergo an imprisonment of not less than 3 years or more than 6 years and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Penna. Date of last commitment May 22, 1963. This sentence to run concurrent with sentence imposed at No. 58 June 1963 O & T.

Eodie: And now, Jan. 24, 1964 deft. Frank Chambers at # 91 June 1963 deft. with counsel present in open Court, sentenced to pay a fine of 6¼ cents to the

Commonwth, pay costs of presocution and undergo an imprisonment of not less than 2 years or more than 7 years and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Penna. This sentence to begin and take effect at the expiration of sentence imposed at 78 (and 58) June 1963 O&T.

Eodie: And now, Jan. 24, 1964 defendant Frank Chambers at No. 78 June 1963 O&T present with Counsel in open Court, sentenced to pay a fine of 6¼ cents to the Commonwth, pay costs of prosecution and undergo an imprisonment of not less than 4 years or more than 8 years and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Penna. Date of last commitment 5-22-63. This sentence to run concurrent with sentence imposed at No. 58 June 1963 O&T.

* * * *

Squire's No._____

Information

N. B.—In filling out this blank, follow the Words of the Act of Assembly Strictly.

Commonwealth of Pennsylvania

vs.

Raymond Lawson.
209 Vine, St. Braddock, Pa
Frank Chambers.
2132 Monongahela, Ave. Swissvale, Pa
Henry Ramsey.
2123 Monongahela, Ave. Swissvale, Pa
Joseph Jackson.
2123 Monogahela, Ave. Swissvale, Pa

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } ss.

Before me, the subscriber, a committing magistrate in and for the COUNTY OF ALLEGHENY, personally came Joseph T. Reddington. McKeesport, Pa Police Dept.

who upon oath duly administered according to law, deposes and says that at McKeesport in the COUNTY OF ALLEGHENY, on the 13th day of May A. D. 19 63

defendant S being armed with an offensive weapon, to-wit: a pistol unlawfully andfeloniously did make an assault upon Raymond Havicon. with intent to rob the said Raymond Havicon. of the moneys of the Boron Gas Station. at 1600 Lysle, Blvd. McKeesport, Pa in his possession, and did rob, steal and carry away from the Boron Gas Station.($66.) in U. S. currency the property of the Boron Gas, Co. and also did take steal and carry away from Raymond Havicon. ($10.) of his personal money.

all of which is contrary to an Act of Assembly in such cases made and provided.

Complainant therefore prays and desires that a warrant may issue, and that defendant may be arrested and held to answer this charge of Armed Robbery.

and further deponent saith not.

Sworn to and subscribed before me, this 31st day of May, A. D. 19 63

Frederick H Bradley
Alderman

FREDERICK H. BRADLEY, ALDERMAN
1036 WALNUT ST. McKEESPORT, PA
MY COMMISSION EXPIRES FIRST
MONDAY OF JANUARY 1968

Joseph T Reddington

This information made on information received all of which the complainant believes to be true and expects to prove at the trial of this case.

TRANSCRIPT OF DOCKET

COMMONWEALTH
vs.
Raymond Lawson.
209 Vine, St. Braddock, Pa
Frank Chambers.
2132 Monongahela, Ave. Swissvale, Pa
Henry Ramsey.
2123 Monongahela, Ave. Swissvale, Pa
Joseph Jackson.
2123 Monongahela, Ave. Swissvale, Pa

Charge: Armed Robbery.

Warrant issued to Joseph T. Reddington.

May 31st A. D., 19 63., on oath of Joseph T. Reddington.

And now May 31st A. D., 19 63., Defendant arrested by virtue of above recited warrant at McKeesport, Pa

and bail required for a hearing on the 31st day of May, 19 63 at 3 o'clock P. M., in the sum of $ No bond.

And now, May 31st, 19 63., at 3 o'clock P. M., the time fixed for hearing, a hearing is had in above stated case, the defendant appearing.

On the part of the Commonwealth, the following witnesses were **Produced**, sworn and examined, viz.:

Joseph T. Reddington.
Anthony Lesniewski.
Raymond Havicon.

Whereupon, it appearing to me, the said magistrate, that a prima facie case has been made out, the said defendant s be held to the next term of the Court of Quarter Sessions and Oyer and Terminer, and bail required for appearance thereat in the sum of $ No bond. defendants committed to Alleg. Co. jail
The name and address of the person whom defendant desires to be notified of the time of trial, given by said defendant, upon being asked by me is (are) (Act of July 10, 1935, P. L. 648.)

STATE OF PENNSYLVANIA, COUNTY OF ALLEGHENY, ss.

I, hereby certify that the foregoing is a true and correct transcript from my docket, and that the recognizances attached to the return in this case were duly taken and acknowledged before me.

FREDERICK H. BRADLEY, ALDERMAN
1032 WALNUT ST., MCKEESPORT, PA
MY COMMISSION EXPIRES FIRST

Frederick H Bradley (SEAL)
Justice of the Peace Alderman

PROSECUTOR'S RECOGNIZANCE

I, Joseph T. Reddington. do hereby acknowledge myself indebted to the Commonwealth of Pennsylvania in the sum of ($50.) Fifty Dollars, lawful money of the United States, to be levied, etc., conditioned that I be and appear at and throughout the NEXT TERM of the Courts of Oyer and Terminer and Quarter Sessions of Allegheny County, to testify on the part of the Commonwealth in a certain charge of Armed Robbery.
Raymond Lawson. Frank Chambers.
by me preferred against Henry Ramsey. & Joseph Jackson., and to abide and not depart the Court without leave.

Joseph T. Reddington (SEAL)

Taken and acknowledged before me, this 31st day of May, A. D. 19 63

Frederick H Bradley (SEAL)
Justice of the Peace Alderman

FREDERICK H. BRADLEY, ALDERMAN
1032 WALNUT ST., MCKEESPORT, PA
MY COMMISSION EXPIRES FIRST MONDAY IN JANUARY, 1968

The names, residences and occupations of the defendant , bail and witnesses are as follows:

	Name	Residence	Occupation
Defendant s	Raymond Lawson.	209 Vine, St. Braddock, Pa	Laborer
	Frank Chambers.	2132 Monongahela, Ave. Swissvale, Pa	Laborer
	Henry Ramsey.	2123 Monongahela, Ave. Swissvale, Pa	Laborer
	Joseph Jackson.	2123 Monongahela, Ave. Swissvale, Pa	Laborer
Bail			
Prosecutor	Joseph T. Reddington,	McKeesport, Pa Police Station.	Police officer
Commonwealth Witness	Anthony Lesniewski.	McKeesport, Pa Police Station.	Police officer
	Raymond Havicon.	156 Wilbur, Ave. Turtle Creek, Pa	Gas Sta. Attend.

DEFENDANT'S APPEARANCE BOND

Know All Men By These Presents,

That.....

principal and.....
surety are held and firmly bound unto the Commonwealth of Pennsylvania for use of the County of Allegheny in the sum of

..... ($.....) dollars
to be paid to the said Commonwealth of Pennsylvania, for use of the County of Allegheny aforesaid, its certain attorney, or assigns. To which payment, well and truly to be made, said principal and said surety do bind themselves, their executors, administrators and successors and jointly and severally, firmly by these presents.

WITNESS our hands and seals, the.....day of.....in the year of

our Lord, one thousand nine hundred and.....

WHEREAS the above bounden.....
has been charged within the County of Allegheny, Commonwealth of Pennsylvania, with a violation or violations of the criminal laws of this Commonwealth, to-wit:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,

That if the said.....
shall be and appear in either the Court of Oyer and Terminer and General Jail Delivery or in the Court of Quarter Sessions of the Peace, for the County of Allegheny, State of Pennsylvania, as the case may require, at the next term of said Courts and at any succeeding term thereof, and at all such times as his presence may be needed, required, ordered or directed, to answer the aforesaid charge or charges, and shall abide and not depart the Court without leave, then this obligation to be void; Otherwise to be and remain in full force and effect.

And further, we do hereby empower any Attorney of any Court of Record within the Commonwealth of Pennsylvania or elsewhere to appear for us, and with or without one or more declarations filed, confess judgment against us and in favor of said Commonwealth of Pennsylvania for use of the County of Allegheny, its assigns, as of any term, for the above sum with costs of suit and release of all errors, and without stay of execution and inquisition and extension upon any levy on personal property or real estate is hereby waived, and condemnation agreed to and the exemption of personal property from levy and sale on any execution hereon, is also hereby expressly waived, and no benefit of exemption be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

Taken and acknowledged before me this

day of , 19

.....(SEAL)

.....(SEAL)

.....
Title of Officer

JUSTIFICATION OF SURETY

Bond given for.....Sess., 19..... Offense..... ALLEGHENY COUNTY, ss.

.....being duly sworn, says:

1. I reside at....., and

am by occupation.....

2. I have no undisposed of cases against me pending in the Criminal Courts of Allegheny County, except as follows:

.....

3. I am the sole owner of real estate situate in said County of Allegheny as follows, viz: A lot of ground, in size

.....feet, situate at.....in the

.....of.....,

which is improved with the following buildings:

4. The said property was obtained by me by Deed/Will from.....

5. The Deed/Will is dated.....and is recorded in the office of the Recorder Register of Allegheny County, in Deed/Will Book Vol....., Page....., and the title is in my own name alone.

Also a lot of ground, in size.....feet, situate at.....

in the.....of....., which is improved with the following buildings:..... The said property was obtained by me by Deed/Will from..... The Deed/Will is dated

.....and is recorded in Deed/Will Book Vol....., Page....., in said Allegheny County, and in my own name alone.

6. I am not surety on any bond of any kind except as follows: .....

7. I do not contemplate the sale of the property above described and am not now negotiating any sale of same.

8. There are no mortgages, or other liens or encumbrances of any kind or description, upon the said premises, and there are no judgments against me except as follows:

Mortgages as set forth in the Recorder's Office on first.....

Mortgages as set forth in the Recorder's Office on second.....

Judgments and Liens..... County taxes have been paid for the last preceding three (3) years.

9. The County assessed valuation of said premises is:

For current year: on first.....Dollars (.....)

on Second.....Dollars (.....)

10. I have read carefully the foregoing affidavit, and know that it is correct.

Sworn and subscribed before me this.....

day of.....19.....

.....

.....(SEAL)

Justice of the Peace—Alderman

ALDERMAN AND J. P. COSTS

ACT NO. 498, APPROVED JANUARY 7, 1952

CRIMINAL CASES

(1)	Summary conviction, except motor vehicle cases	$ 9.00
(2)	Summary conviction, motor vehicle cases	5.00
(3)	Misdemeanor	11.00
(4)	Felony	15.00
(b)	Such fees shall include all charges, including, when called for, the costs of postage and registered mail and the costs of giving a transcript to the prosecutor or defendant or both if requested.	

CIVIL CASES

(1)	Assumpsit or trespass involving $100.00 or less	$ 7.50
(2)	Assumpsit or trespass involving more than $100.00	10.00
(3)	Landlord and tenant proceeding	15.00
(4)	Attachment in execution proceeding after judgment	5.00
(b)	Such fees shall include all charges, including, when called for, the costs relating to depositions and interrogatories and the costs of postage and registered mail, except the costs of a transcript of every proceeding on appeal or certiorari (including affidavit, bail, and certificate) which shall be $2.50 per transcript.	

CONSTABLE'S COSTS

ACT NO. 179, APPROVED JUNE 28, 1951

(Attach Jail Receipts)

Executing Warrant $2.50

Mileage ..... 10 cts. each traveled

Serving Subpoena in all Cases ..... $1.50 first, 75 cts. each additional

Mileage ..... 10 cts. each traveled

Executing Commitment $2.50

Mileage ..... 10 cts. each traveled

Executing Release $2.50

Mileage ..... 10 cts. each traveled

Executing Re-Commitment $2.50

Mileage ..... 10 cts. each traveled

For services not herein especially provided for, the same fee may be charged and received as for similar services.

O & T E

No. 78 June Term, 19 63

Commonwealth of Pennsylvania

Raymond Lawson. 209 Vine, St. Braddock, Pa
Frank Chambers. 2132 Monongahela, Ave. Swissvale, Pa
Henry Ramsey. 2123 Monongahela, Ave. Swissvale, Pa
Joseph Jackson #3 2123 Monongahela, Ave. Swissvale, Pa

Charge Armed Robbery.

Date of Information May 31. 1963

On Oath of Joseph T. Reddington.
McKeesport, Pa Police Dept.

Squire's Docket No.

Coram
Frederick H. Bradley. Police Mag.
1036 Walnut, St.
McKeesport, Pa

Costs $ 15.00

Pros. Priv. Counsel #3
"Blumenfeld" for Joseph Jackson

Deft's Counsel

Bondsman Orig. $10000

Address (for Lawson)

Deft's Residence Swissvale, Pa

Arrested at McKeesport, Pa

Officer Joseph T. Reddington.
McKeesport, Pa Police DEpt.

Pros. Found McKeesport, Pa

P. O. Naly Co., Law Blank Publishers, 415 Grant St., Pgh. 19, Pa.

INSTRUCTIONS TO ALDERMEN AND JUSTICES OF THE PEACE

READ CAREFULLY

1. You are not permitted to take bail in the following cases, viz.: Murder, manslaughter, arson, rape, felonious rape, mayhem, sodomy, buggery, robbery, burglary.

2. Always hold the defendant and take bail to the NEXT term of Court, except in Surety of the Peace cases, when return must be made forthwith. In such cases the words "Next Term," wherever they appear, must be changed to read "forthwith." The terms of Court begin the first Mondays of January, February, March, April, May, June, September, October, November and December.

3. The law requires you to take and return the names, residences and occupations, if any, of the defendant, bail and witnesses. Failure to do so is a misdemeanor punishable by a fine of $300.

4. The law requires you to return all cases of felony within FIVE days after the hearing and all cases of misdemeanor at least ten days before the commencement of the term to which they are held. In all cases in which the defendant is committed for Court without bail or in default of bail, the return must be made within 48 hours. Failure so to do is a misdemeanor punishable by a fine of $300.

5. See that the Justification of Surety is properly filled up and that all of the information required as to the identity of the surety, condition of his property, etc., is given clearly and correctly and verified by affidavit.

6. In the event of disregard of any of the foregoing requirements in addition to incurring the penalty provided by law, the committing magistrate will be liable under the Rules of Court to forfeit all costs in the case.

7. Within five days after any Magistrate or Justice of the Peace binds over or commits a defendant for trial at a Court of Oyer and Terminer or Quarter Sessions of the Peace, he must return and file with the Clerk of said Court the information and a true transcript of his docket, otherwise his costs shall not be taxed (Rule 18).

8. This form of docket information and Return has been approved by the Court and the District Attorney, and is recommended for use by all Justices of the Peace, Aldermen and Police Magistrates.

IN THE

Court of Oyer and Terminer and General Jail Delivery

FOR THE COUNTY OF ALLEGHENY.

Of JUNE *Sessions, A. D. 19* 63

Allegheny County, ss:

The Grand Inquest *of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Allegheny, upon their oaths and solemn affirmations, respectively,* **DO PRESENT,** *That*

Raymond Lawson; Frank Chambers; Henry Ramsey and Joseph Jackson

AS TO DEFEND. RAYMOND LAWSON.

And now APR 24 1964 19 In open court, defendant appearing with counsel, sentenced to pay a fine of $1. and costs of prosecution and undergo an imprisonment of not less than 3 YEARS or more than 6 YEARS to the Commonwealth, to the Western Correctional Diagnostic and Classification Center of Pennsylvania. Date of last commitment 1-18-65 RAPE CASE.

JAN 18 1965 Judge of the Criminal Court of Allegheny County, Pennsylvania, Judicial District Specially Presiding.

in the year of our Lord, one thousand, nine hundred and thirteenth

in the County aforesaid, and within the jurisdiction of this Court,

then and there armed with an offensive weapon, to wit, a pistol

with FORCE AND ARMS, in and upon one Raymond Havicon, being then and there a duly qualified and lawfully acting officer, agent and employee of Boron Oil Company, a corporation,

feloniously did make an assault, and did then and there feloniously beat, strike and ill use the said Raymond Havicon

and do violence to said Raymond Havicon

with intent then and there to feloniously rob the said Raymond Havicon and Boron Oil Company, a corporation

and

the sum of Sixty-six dollars, lawful money of the Government of the United States, of the goods, moneys, chattels and property of the said Boron Oil Company, a corporation, in the lawful possession and custody of Raymond Havicon as aforesaid, from the person of the said Raymond Havicon feloniously did rob. seize. steal, take and carry away,

and

the sum of Ten dollars, lawful money of the Government of the United States

AS TO DEFENDANT FRANK CHAMBERS; - JAN 24 1964

DEFENDANT (S) WITH COUNSEL PRESENT IN OPEN COURT WHEN SENTENCE IMPOSED.

And now JAN 24 1964 19 In open court, defendant appearing with counsel, sentenced to pay a fine of $1. and costs of prosecution and undergo an imprisonment of not less than 4 YEARS or more than 8 YEARS to the Commonwealth, and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. Date of last commitment 3-2-63

10 This sentence to run concurrent with sentence imposed at No. 63 Sessions 63 JUNE O.T.

JAN 24 1964 Judge of the Criminal Court of Allegheny County, Pennsylvania, Judicial District Specially Presiding.

of the goods, moneys, chattels and property of the said Raymond Havicon

from the person of the said Raymond Havicon

, feloniously did rob, seize, steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania

AND THE INQUEST AFORESAID, upon their oaths and solemn affirmations aforesaid DO FURTHER PRESENT, That the said

Raymond Lawson; Frank Chambers; Henry Ramsey and Joseph Jackson

afterwards to wit: on the same day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, with FORCE AND ARMS, the goods, moneys chattels and property aforesaid, by some person whose name is to said Inquest unknown then lately before feloniously stolen, taken and carried away, unlawfully, unjustly and for the sake of wicked gain, feloniously did receive and have (the said

Raymond Lawson; Frank Chambers; Henry Ramsey and Joseph Jackson

then and there, well knowing the goods, moneys , chattels and property last mentioned, to have been feloniously stolen, taken and carried away) contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Test Pro Respub.

Joseph T. Reddington
Anthony Lesniewski
Raymond Havicon
Peter Maund
Theodore Wozar
Charles Connelly

Edward C. [illegible]
District Attorney for Allegheny County.

Sworn by me

Lawrence F. Francioni
Foreman.

OCT 10 [illegible]

[illegible] to be paid by County.
Defendant and Prosecutor
reimburse County.

By the Court

No. 78 June Sessions, 1963

Commonwealth vs

Raymond Lawson
Frank Chambers
Henry Ramsey
Joseph Jackson

INDICTMENT:

1st Count. ARMED Robbery.

2nd Count. Receiving Stolen Goods.

Prosecutor: Joseph T. [illegible]

FEB 27 1970

JUN 17 1963

On 19

TRUE BILL

Lawrence F. Francioni Foreman.

SEP 27 1963 19

The Defendant,

In Open Court Defendant(s) with Counsel pleads Not Guilty. Issue joined by District Attorney.

County
Page 440
Doc. 450

Defendant (s) present in Open Court when verdict (s) recorded.

Trial Judge.

OCT 3 1963

Guilty - No Verdict as to Raymond Lawson and Frank Chambers.

132 Judicial District
Specially Presiding

OCT. 1 1963

(SEE INSIDE)

6

FORM NALY No. 371—Criminal Court Information-Transcript—(1950) For sale by P. O. Naly Co., Law Blank Publishers, 419 Grant St., Pgh. 19, Pa.

Squire's No.

Information

N. B.—In filling out this blank, follow the Words of the Act of Assembly Strictly.

Commonwealth of Pennsylvania

vs.

Raymond Lawson
209 Vine St.
Braddock, Pa.

Henry Ramsay
2123 Monongahela Ave.
Swissvale, Pa.

Frank Chambers
2132 Monongahela Ave.
Swissvale, Pa.

Joseph Jackson
2123 Monongahela Ave.
Swissvale, Pa.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF ALLEGHENY, } ss.

Before me, the subscriber, a committing magistrate in and for the **COUNTY OF ALLEGHENY**, personally came Charles L. Cassidy who upon oath duly administered according to law, deposes and says that at North Braddock in the **COUNTY OF ALLEGHENY**, on the 20th day of May A. D. 19 63 defendant being then and there armed with an offensive weapon to wit: a gun unlawfully and feloniously did assault one Stephen Kovacich with the intent then and there to rob, steal, take and ~~acarry~~ away the sum of ~~$~~214.16 being the property of the Gulf Gas Station at 6th and Baldridge Ave. North Braddock Allegheny County, Penna.

On Information Received

all of which is contrary to an Act of Assembly in such cases made and provided. Complainant therefore prays and desires that a warrant may issue, and that defendant may be arrested and held to answer this charge of ~~22nd~~ ARMED ROB FRY and further deponent saith not.

Sworn to and subscribed before me, this 22nd day of May, A. D. 19 63

Thomas Curran

Justice of the Peace—~~Alderman~~

THOMAS CURRAN, J. P.
North Braddock, Allegheny Co., Pa.
My Commission Expires
First Monday in January 1964

Charles L Cassidy

10

TRANSCRIPT OF DOCKET

COMMONWEALTH

Raymond Lawson
209 Vine St.
Braddock, Pa.

vs. Frank Chambers
2132 Monongahela Ave
Swissvale, Pa.

Henry Ramsay
2123 Monongahela Ave.
Swissvale, Pa.

Joseph Jackson
2123 Monongahela Ave.
Swissvale, P

Charge: ARMED ROBBERY

A warrant issued to GUY CICCO

MAY 22 A. D., 1963, on oath of

Charles L. Cassidy

And now May 22, A. D., 1963, Defendant

arrested by virtue of above recited warrant at North Braddock

and bail required for a hearing on the 22nd day of May, 19 63,

at 1:00 o'clock P M., in the sum of $ no bail

And now, May 22, 19 63, at 1:00 o'clock P M., the time fixed for hearing, a hearing is had in above stated case, the defendant appearing.

On the part of the Commonwealth, the following witnesses were Produced, sworn and examined, viz.:

Defendant pleads not Guilty

Whereupon, it appearing to me, the said magistrate, that a prima facie case has been made out, the said defendant is held to the next term of the Court of Quarter Sessions and Oyer and Terminer, and bail required for appearance thereat in the sum of $ no bail

The name and address of the person whom defendant desires to be notified of the time of trial, given by said defendant, upon being asked by me is (are) (Act of July 10, 1935, P. L. 648.)

Barbara Lawson 209 Vine St. Braddock, Pa.
Grace Ramsay 2123 Monongahela Ave Swissvale, Pa.
Mary Ann Jackson 2123 Monongahela Ave. Swissvale, Pa.

STATE OF PENNSYLVANIA, COUNTY OF ALLEGHENY, ss.

I, hereby certify that the foregoing is a true and correct transcript from my docket, and that the recognizances attached to the return in this case were duly taken and acknowledged before me.

Thomas Curran (SEAL)

Justice of the Peace—Alderman

PROSECUTOR'S RECOGNIZANCE

I, Charles L. Cassidy do hereby acknowledge myself indebted to the Commonwealth of Pennsylvania in the sum of fifty Dollars, lawful money of the United States, to be levied, etc., conditioned that I be and appear at and throughout the NEXT TERM of the Courts of Oyer and Terminer and Quarter Sessions of Allegheny County, to testify on the part of the Commonwealth in a certain charge of Armed Robbery Raymond Lawson Frank Chambers by me preferred against Henry Ramsay Joseph Jackson, and to abide and not depart the Court without leave.

Charles L Cassidy (SEAL)

Taken and acknowledged before me, this 22nd day of May, A. D. 19 63

Thomas Curran (SEAL)

Justice of the Peace—Alderman

The names, residences and occupations of the defendant , bail and witnesses are as follows:

Name	Residence	Occupation
Defendants Raymond Lawson	209 Vine St. Braddock, Pa	Hod-carrier
Frank Chambers	2132 Monongahela Ave. Swissvale, Pa.	Contracter
Henry Ramsay	2123 Monongahela Ave. Swissvale, Pa.	Painter
Joseph Jackson	2123 Monongahela Ave. Swissvale, Pa.	unemployed
Bail none		
Prosecutor Charles L. Cassisy	North Braddock Police Station	Police Officer
Commonwealth Witness Stephen Kovacich	53 McCune St. Braddock, Pa	gas attendant

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DEFENDANT'S APPEARANCE BOND

Know All Men By These Presents,

That.....

principal and.....
surety are held and firmly bound unto the Commonwealth of Pennsylvania for use of the County of Allegheny in the sum of

..... ($.....) dollars
to be paid to the said Commonwealth of Pennsylvania, for use of the County of Allegheny aforesaid, its certain attorney, or assigns. To which payment, well and truly to be made, said principal and said surety do bind themselves, their executors, administrators and successors and jointly and severally, firmly by these presents.

WITNESS our hands and seals, the.....day of.....in the year of

our Lord, one thousand nine hundred and.....

WHEREAS the above bounden.....
has been charged within the County of Allegheny, Commonwealth of Pennsylvania, with a violation or violations of the criminal laws of this Commonwealth, to-wit:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH,

That if the said.....
shall be and appear in either the Court of Oyer and Terminer and General Jail Delivery or in the Court of Quarter Sessions of the Peace, for the County of Allegheny, State of Pennsylvania, as the case may require, at the next term of said Courts and at any succeeding term thereof, and at all such times as his presence may be needed, required, ordered or directed, to answer the aforesaid charge or charges, and shall abide and not depart the Court without leave, then this obligation to be void; Otherwise to be and remain in full force and effect.

And further, we do hereby empower any Attorney of any Court of Record within the Commonwealth of Pennsylvania or elsewhere to appear for us, and with or without one or more declarations filed, confess judgment against us and in favor of said Commonwealth of Pennsylvania for use of the County of Allegheny, its assigns, as of any term, for the above sum with costs of suit and release of all errors, and without stay of execution and inquisition and extension upon any levy on personal property or real estate is hereby waived, and condemnation agreed to and the exemption of personal property from levy and sale on any execution hereon, is also hereby expressly waived, and no benefit of exemption be claimed under and by virtue of any exemption law now in force or which may be hereafter passed.

Taken and acknowledged before me this

day of , 19

..... (SEAL)

..... (SEAL)

.....
Title of Officer

JUSTIFICATION OF SURETY

Bond given for.....Sess., 19..... Offense..... ALLEGHENY COUNTY, ss.

.....being duly sworn, says:

1. I reside at....., and am by occupation.....

2. I have no undisposed of cases against me pending in the Criminal Courts of Allegheny County, except as follows:
.....

3. I am the sole owner of real estate situate in said County of Allegheny as follows, viz: A lot of ground, in size .....feet, situate at.....in the .....of.....,
which is improved with the following buildings:

4. The said property was obtained by me by Deed/Will from.....

5. The Deed/Will is dated.....and is recorded in the office of the Recorder Register of Allegheny County, in Deed/Will Book Vol....., Page....., and the title is in my own name alone.

Also a lot of ground, in size.....feet, situate at.....
in the.....of....., which is improved with the following buildings:..... The said property was obtained by me by Deed/Will from..... The Deed/Will is dated .....and is recorded in Deed/Will Book Vol....., Page....., in said Allegheny County, and in my own name alone.

6. I am not surety on any bond of any kind except as follows: .....

7. I do not contemplate the sale of the property above described and am not now negotiating any sale of same.

8. There are no mortgages, or other liens or encumbrances of any kind or description, upon the said premises, and there are no judgments against me except as follows:

Mortgages as set forth in the Recorder's Office on first.....

Mortgages as set forth in the Recorder's Office on second.....

Judgments and Liens..... County taxes have been paid for the last preceding three (3) years.

9. The County assessed valuation of said premises is:

For current year: on first.....Dollars (.....)

on Second.....Dollars (.....)

10. I have read carefully the foregoing affidavit, and know that it is correct.

Sworn and subscribed before me this.....

day of....., 19.....

.....

.....(SEAL)
Justice of the Peace—Alderman

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O & T 2863

No. 91 June Term, 1963

Commonwealth of Pennsylvania

vs.

Raymond Lawson, 209 Vine St., Braddock, Pa.
Frank Chambers, 2132 Monongahela Av., Swissvale, Pa.
Henry Ramsay, 2123 Monongahela Ave., Swissvale
Joseph Jackson, 2123 Monongahela Ave., Swissvale

Charge Armed Robbery

Date of Information May 22, 1963

On Oath of Charles L. Cassidy

N. Braddock Police station

Squire's Docket No.

Coram

Thomas Curran J of P
1107 Bell Avenue
North Braddock, Pa.

Costs $

Pros. Priv. Counsel

Deft's Counsel H Blumenfeld for Jackson
R. Johnson for Lawson
Zamos for Chambers
H Lebovitz for Ramsey

Bondsman Pete Mirabito & Gorsuch

Address

Deft. Residence

Arrested at North Braddock

Officer Guy Cicco

546 Price Ave. N. Braddock, Pa.

Pros. Found North Braddock, Pa.

P. O. Naly Co., Law Blank Publishers, 415 Grant St., Pgh. 19, Pa.

6/27

1

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ALDERMAN AND J. P. COSTS

ACT NO. 402, APPROVED JANUARY 7, 1952

CRIMINAL CASES

(1) Summary conviction, except motor vehicle cases	$ 9.00
(2) Summary conviction, motor vehicle cases	5.00
(3) Misdemeanor	11.00
(4) Felony	15.00

(b) Such fees shall include all charges, including, when called for, the costs of postage and registered mail and the costs of giving a transcript to the prosecutor or defendant or both if requested.

$15.00

CIVIL CASES

(1) Assumpsit or trespass involving $100.00 or less	$ 7.50
(2) Assumpsit or trespass involving more than $100.00	10.00
(3) Landlord and tenant proceeding	15.00
(4) Attachment in execution proceeding after judgment	5.00

(b) Such fees shall include all charges, including, when called for, the costs relating to depositions and interrogatories and the costs of postage and registered mail, except the costs of a transcript of every proceeding on appeal or certiorari (including affidavit, bail, and certificate) which shall be $2.50 per transcript.

CONSTABLE'S COSTS

ACT NO. 179, APPROVED JUNE 28, 1961

(Attach Jail Receipts)

Executing Warrant $2.50	2.50
Mileage 10 cts. each traveled	.20
Serving Subpoena in all Cases $1.50 first, 75 cts. each additional	1.50
Mileage 10 cts. each traveled	.20
Executing Commitment $2.50	2.50
Mileage 10 cts. each traveled	.20
Executing Release $2.50	2.50
Mileage 10 cts. each traveled	.20
Executing Re-Commitment $2.50	2.50
Mileage 10 cts. each traveled	2.60
Prisoners Fare	~~.60~~

For services not herein especially provided for, the same fee may be charged and received as for similar services.

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INSTRUCTIONS TO ALDERMEN AND JUSTICES OF THE PEACE

READ CAREFULLY

1. You are not permitted to take bail in the following cases, viz.: Murder, manslaughter, arson, rape, felonious rape, mayhem, sodomy, buggery, robbery, burglary.

2. Always hold the defendant and take bail to the NEXT term of Court, except in Surety of the Peace cases, when return must be made forthwith. In such cases the words "Next Term," wherever they appear, must be changed to read "forthwith." The terms of Court begin the first Mondays of January, February, March, April, May, June, September, October, November and December.

3. The law requires you to take and return the names, residences and occupations, if any, of the defendant, bail and witnesses. Failure to do so is a misdemeanor punishable by a fine of $300.

4. The law requires you to return all cases of felony within FIVE days after the hearing and all cases of misdemeanor at least ten days before the commencement of the term to which they are held. In all cases in which the defendant is committed for Court without bail or in default of bail, the return must be made within 48 hours. Failure so to do is a misdemeanor punishable by a fine of $300.

5. See that the Justification of Surety is properly filled up and that all of the information required as to the identity of the surety, condition of his property, etc., is given clearly and correctly and verified by affidavit.

6. In the event of disregard of any of the foregoing requirements in addition to incurring the penalty provided by law, the committing magistrate will be liable under the Rules of Court to forfeit all costs in the case.

7. Within five days after any Magistrate or Justice of the Peace binds over or commits a defendant for trial at a Court of Oyer and Terminer or Quarter Sessions of the Peace, he must return and file with the Clerk of said Court the information and a true transcript of his docket, otherwise his costs shall not be taxed (Rule 18).

8. This form of docket information and Return has been approved by the Court and the District Attorney, and is recommended for use by all Justices of the Peace, Aldermen and Police Magistrates.

1963 JUN 11 AM 9:[illegible]
DISTRICT ATTORNEY

IN THE

Court of Oyer and Terminer and General Jail Delivery

FOR THE COUNTY OF ALLEGHENY.

Of JUNE *Sessions, A. D. 19* 63

Allegheny County, ss:

The Grand Inquest *of the Commonwealth of Pennsylvania, now inquiring in and for the body of the County of Allegheny, upon their oaths and solemn affirmations, respectively,* **DO PRESENT,** *That*

Raymond Lawson, Frank Chambers, Henry Ramsey and Joseph Jackson

late of the County aforesaid, on the twentieth day of May in the year of our Lord, one thousand nine hundred and sixty-three in the County aforesaid, and within the jurisdiction of this Court,

being then and there armed with an offensive weapon, to-wit: two Revolvers

with FORCE AND ARMS, in and upon one Stephen Kovacich, being then and there a duly qualified and lawfully acting officer, agent and employee of John Lucarelli and John Marvelli (doing business as Gulf Gas Station) feloniously did make and assault, and did then and there feloniously beat, strike and ill use the said Stepnen Kovacich and do violence to said Stephen Kovacich with intent then and there to feloniously rob the said Stephen Kovacich and the sum of One Hundred Fourteen dollars, and sixteen cents, lawful money of the Government of the United States

And now APR 24 1964 19 in open court, defendant appearing with counsel, sentenced to pay a fine of $1 & C to the Commonwealth, pay costs of prosecution and undergo an imprisonment of not less than 6 YEARS or more than 6 YEARS and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. Date of last commitment 19 — BALT. CASE.

This sentence to run concurrent with sentence imposed at No. 78 JUNE Sessions 19 63 O.T.

[illegible] Judicial District Specially Presiding

Sentence, JAN 8 1965 defendant in Liberty formally committed and sentence of April 24, 1964 sentence of defendant to be of imprisonment to be served in the Penitentiary for said time, to be computed to commence and to date from May 22nd 1963. (From May 22nd to July 7th is 2 months and 16 days.)

[illegible] Judicial District Specially Presiding

RAYMOND LAWSON

And now JAN 24 1964 19 in open court, defendant appearing with counsel, sentenced to pay a fine of $1 & C to the Commonwealth, pay costs of prosecution and undergo an imprisonment of not less than 2 YEARS and stand committed and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. Date of last commitment 19 —

This sentence begin and take effect at the expiration of sentence imposed at No. 78 (APRIL) JUNE Sessions 19 63 O.T.

[illegible] Judicial District Specially Presiding

(SEE NEXT PAGE)

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and the goods, chattels and property of the said John Lucarelli and John Marvelli, as aforesaid, in the [illegible] possession and custody of Stephen Kovacich from the person of the said Stephen Kovacich feloniously did rob, seize, steal, take and carry away, contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania

And now, SEP 5 1963, on motion of defence counsel and Co-Counsel for co-defendants, moves for withdrawal of a juror. Asst. District Attorney Schmitt Jr. joins in the motion. The Court grants the motion and orders the withdrawal of a juror.

Judge

Judicial District
Specially Presiding

OCT 3 1963

Guilty - See Verdict Filed AS TO EACH DEFENDANT.

Defendant (s) present in Open Court when verdict (s) recorded.

Trial Judge.

RECORD

CRIMINAL COURT

No. 91 JUNE Sessions, 1963

94

Commonwealth

vs.

97

Raymond Lawson
Frank Chambers
Henry Ramsey
Joseph Jackson

INDICTMENT

COUNT
PAGE 401
DOC 150

1st Count, ARMED Robbery

2nd Count, Receiving Stolen Goods.

RECEIVED

Prosecutor

FEB 27 1970

OFFICE OF THE CLERK
SUPREME COURT, U.S.

Charles

JUN 20 1963

On 19

TRUE BILL

Lawrence F. Francheschini Foreman.

SEP 4 1963

SEP 27 1963 19

The Defendants

In Open Court Defendant (s) with Counsel pleads Not Guilty. Issue joined by District Attorney.

AS TO JOSEPH JACKSON:

JAN 24 1964

DEFENDANT (S) WITH COUNSEL PRESENT IN OPEN COURT WHEN SENTENCE IMPOSED.

JAN 24 1964

Defendant sentenced to pay a fine of [illegible] to the Commonwealth, costs of prosecution, and undergo imprisonment of not less than 11½ MONTHS or more than 23 MONTHS in the Allegheny County Workhouse and stand committed. DATE LAST COMMITMENT MAY 22, 1963.

To be released on parole at expiration of minimum for balance of maximum term.

Judicial District
Specially Presiding

And now May 6, 1964 Defendant Joseph Jackson having been released on parole by the Court

District Attorney for Allegheny County

OCT 1 1963

Foreman

to be paid by County(s) Defendant and Prosecutor Westmoreland County.

By the Court

AS TO HENRY RAMSEY:

JAN 24 1964

And now in open court, defendant appearing with counsel, sentenced to pay a fine of [illegible] to the Commonwealth, pay costs of prosecution and undergo an imprisonment of not less than 5 YEARS or more than 6 YEARS in the State Penitentiary, and be sent to the Western Correctional Diagnostic and Classification Center of Pennsylvania. Date of last commitment MAY 22, 1963.

Judicial District
Specially Presiding

Raymond Lawson, Frank Chambers, Henry Ramsey and Joseph Jackson

then and there, well knowing the goods, moneys, chattels and property last mentioned, to have been feloniously stolen, taken and carried away) from the person of [illegible] in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Raymond Lawson, Frank Chambers, Henry Ramsey and Joseph Jackson

contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

Raymond Lawson, Frank Chambers, Henry Ramsey and Joseph Jackson

did receive and have (the said goods, moneys, chattels and property last mentioned, to have been feloniously stolen, taken and carried away) from the person of [illegible] in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

That the said Raymond Lawson, Frank Chambers, Henry Ramsey and Joseph Jackson

on the 13th day of June in the year of our Lord one thousand nine hundred and sixty three, at the County aforesaid, and within the jurisdiction of this Court, with force and arms, in and upon the person of [illegible] in the peace of God then and there being, unlawfully and violently did make an assault, and him the said [illegible] unlawfully and violently did put in fear and danger of his life, and then and there unlawfully and violently did steal, take and carry away from the person and against the will of the said [illegible] the

IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY AND THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF ALLEGHENY, PENNSYLVANIA

June 1963

Nos. 78 and 91

Armed Robbery
Receiving Stolen Goods

COMMONWEALTH OF PENNSYLVANIA

vs.

RAYMOND LAWSON, FRANK CHAMBERS, HENRY RAMSEY and JOSEPH JACKSON

Pittsburgh, Penna.
September 27, 1963.

BEFORE:

HON. J. FRANK GRAFF, J., Specially Presiding, and a Jury.

COUNSEL PRESENT

For the Commonwealth:
John Means, Esq., Assistant District Attorney

For Raymond Lawson:
Robert Johnson, Esq.

For Frank Chambers:
Vincent Tamburo, Esq.

For Henry Ramsey:
Herbert Lebovitz, Esq.

For Joseph Jackson:
Herbert Blumenfeld, Esq.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

WILLIAM F. VODDE
Official Reporter
312 Courthouse
Pittsburgh 19, Pa.

[fol. 2]

Pittsburgh, Pa.
September 27, 1963.

COURT opened at 11:40 A.M.

(At side bar.)

MR. JOHNSON: Your Honor, on behalf of the Defendant, Raymond Lawson, counsel objects to the joinders of these two indictments at No. 78 June Sessions 1963 and No. 91 June Sessions 1963, for the purposes of trial. These are two different charges arising at different times and different places, and counsel feels that it is highly prejudicial to his client to join these two indictments for trial, and he is asking that the Court sever one of these two, and we are prepared to go on either one, but not both at the same time.

MR. BLUMENFELD: On behalf of the Defendant, Joseph Jackson, I would make the same motion.

MR. LEBOVITZ: And I, too, Your Honor, make
[fol. 3] the same motion on behalf of Henry Ramsey.

MR. TAMBURO: On behalf of Frank Chambers, counsel makes the same objection and the same motion.

MR. MEANS: Let me state for the record, as to the defendants Chambers and Lawson, there will be evidence in both cases connecting them with both cases, and that the evidence from the later case, chronologically, they found loot from the first Armed Robbery. As to Jackson and Ramsey, the Commonwealth will be prepared to join in a demurrer at the end of the Commonwealth case as to the Armed Robbery occurring on May 13, 1963.

THE COURT: Is that the first one?

MR. MEANS: Yes, they wouldn't be prejudiced there.

THE COURT: You are telling me, now, that the evidence here, which you have on the second case, [fol. 4] would be proper evidence, that is, part of the proper evidence in the first case against two of the others, but not against the two you mentioned?

MR. MEANS: Yes.

THE COURT: In which you say that you will join in the demurrer as to those two at the conclusion of the Commonwealth's evidence?

MR. MEANS: That's right.

THE COURT: I understand that this matter was for Judge Legnard, who is the proper person to dispose of any motion of this character, and that he has refused to grant a severance, and in view of what the District Attorney has now stated, we will refuse the motion and allow an exception.

(End side bar.)

(JURY sworn at 11:45 A.M. on the cases at No. 78 and No. 91, June Sessions 1963.)

THE COURT: You may open for the Commonwealth.

[fol. 5] MR. MEANS opens to the Jury in behalf of the Commonwealth.

RAYMOND HAVICON, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS: For the Record, this witness is testifying in the case at No. 78 June Term 1963.

MR. MEANS:

Q Will you state your name, sir?
A Raymond Havicon.
Q Where do you live?
A I live in Turtle Creek, 156 Wheeler Avenue.
Q What is your occupation?

A Manager for the Boron Oil Company.
Q Boron Oil is a system of gasoline service stations?
A Yes.
Q I direct your attention to the date of May 13, 1963, were you on duty at one of the Boron Service Stations?
A Yes sir, I was, I was on duty at Fifth and Lylse Boulevard.
THE COURT: Where is that?
[fol. 6] A McKeesport, the address is 1700 Fifth Avenue.

MR. MEANS:

Q And I direct your attention to the early morning and ask you if anything unusual happened?
A Well, on that—
Q Give us the hour, first.
A Around 2:20 in the morning, between 2:20 and 2:30 in the morning, I was working at the gas station, two colored men walked in the front door of our station there, and asked me for change for cigarettes. So, I reached to give him change for cigarettes, and one put a gun in my belly and demanded everything I had.
Q Did this occur inside of the service station?
A In the office of the station.
Q It was lit up?
A Lit up, fully lit.
Q Tell us what happened?
A Also, after I turned over the changer and bills that I had in my pocket, they said, "get back and open the safe," which I went back and opened the bottom of the safe. They made me lay down on the floor of the back room, told me to take my trousers off and "don't look at them", which I did, and then, they left possibly [fol. 7] by the back door of the station, they also took my wallet.
MR. JOHNSON: We object to the narrative answer that the witness is giving. We ask that he be interrogated by counsel.
THE COURT: Overrule the objection and allow an exception, I don't see any narrative at all. Tell us what happened.

A Well, also, they took my trousers and they took my wallet with all my cards in it, also ten dollars in the wallet, and after I got up from the floor again, my trousers were laying in the Lube-bay of the station—

THE COURT: Wait a moment, you found your trousers where?

A In the Lube Room.

THE COURT: What is that?

A That is the grease room.

THE COURT: You found those later, how much later?

A I'd say approximately five minutes afterwards.

[fol. 8] MR. MEANS:

Q How much money was taken, approximately?

A I'd say in bills and change, it was approximately $56.00 taken, plus $10.00 taken from my wallet.

Q In your wallet, were there certain cards identifying you?

A Driver's licenses, owner's card, club cards,—

THE COURT: Wait a moment, driver's license and owner's cards.

A And assorted club cards were in there, and pictures and different addresses and things I had in my wallet.

Q Now, Mr. Havicon, when these men came in and put the gun on you, did you have an opportunity to observe one or both of them, particularly their faces?

A I had a chance to observe the one.

Q Which one?

A The one that was behind him, I did not.

Q One was in front of the other, is that correct?

A Yes.

Q How close did the one that you did observe—how far away from you was he as you looked at him?

A He was almost against me.

THE COURT: Can you indicate in the Court Room [fol. 9] about how far away he'd be from you?

A Right in front of me, I'd say probably a foot.

MR. MEANS:

Q Did you observe how he was dressed?

A Well, at the quick glance that I got of him in the time that elapsed, he had a pair of khaki pants on and sort of a brownish gabardine sort of short coat, it's like a gabardine summer coat.

Q Did he have a hat on, do you remember?

A I didn't notice the hat.

Q Did you have opportunity to observe his facial features closely?

A I did.

Q Are you familiar at all with weapons?

A Yes sir.

Q How do you come to know anything about guns?

A Well, I used to be a policeman at one time on the Swissvale Police Force.

Q And do you recognize the different calibre of pistols or automatics when you see them?

A Yes sir.

Q Do you know what type of gun the man was carrying who held you up that morning?

A Carrying a .38.

[fol. 10] Q Would you describe it better than the calibre?

A It was a .38 revolver, sort of nickel-plated, it was pretty well marred up, more or less the nickel marred off it.

Q I show you what is identified—maybe identified as Commonwealth Exhibit 1, being a .38 calibre pistol and ask you if that is the same as or similar to the gun which was put on you on the morning of May 13?

MR. JOHNSON: I object to the question. If he wishes to ask if it is the same weapon, I think it is proper; if it is similar, I object to it.

THE COURT: Overrule the objection and allow an exception.

A I'd say that it looks like the gun that was used on me that morning.

MR. MEANS:

Q I'll show you what has been marked for identification as Commonwealth Exhibit 2, which consists of four cards with your name on them, and I'll ask you, if you recognize those cards?

A Yes sir, those cards belong to me.

Q Where did you keep those cards on May 13, 1963?

[fol. 11] A They were in my wallet on my person.

Q Is this the wallet you testified was taken by the robbers?

A Yes.

Q When did you receive those cards back?

A Those cards, I never got them back.

Q When did you learn they had been found?

A I learned they were found approximately ten days after I was held up.

MR. MEANS: For the record, we will tie these exhibits up with later witnesses and I will not offer them into evidence until we have done that.

THE COURT: All right.

MR. MEANS:

Q Now, Mr. Havicon, is the man that held the gun on you that evening in this Courtroom?

A Yes sir.

Q Would you point him out?

A Fourth man over there, sitting on the end.

MR. MEANS: Will you stand up, please?

MR. MEANS:

[fol. 12] Q Is that the man there?

A That's him.

THE COURT: What is his name?

MR. MEANS: Let the record show the witness has identified Frank Chambers.

MR. MEANS:

Q Mr. Havicon, are you positive that that is the man who put the gun on you that morning?

A Yes sir.

Q You had a good opportunity to see him? Did you?
A Yes sir.
Q There is no question in your mind that he is the man?
A No question.
MR. MEANS: You may cross examine.

CROSS EXAMINATION

MR. JOHNSON:

Q You say you are employed by the Boron Oil Company?
A That's correct.
Q You say you are a manager of their McKeesport Service Station, is that right?
[fol. 13] A Yes sir.
Q How long have you worked for them?
A I have been with them approximately a year and four months.
Q Boron Oil Company is a wholly owned subsidiary of Standard Oil Company of Ohio?
A Yes sir.
Q Now, you tell us Mr. Havicon, that on the night in question, and that was May 13, is that correct?
A That's right.
Q Two Negroes came up to your station about two-thirty in the morning, is that right?
A Approximately.
Q You were in the inside of the building?
A Yes sir.
Q One had a gun, did the other have a gun?
A I never seen—only seen the one gun.
Q You saw two men?
A Yes sir.
Q Now, you testified a little while ago, that one man was, to use your own words, right in front of you?
A Yes sir.
Q Is that right?
A Yes sir.
[fol. 14] Q Was he so close that if you would have extended your arm, you would have touched him?

A Yes sir.
Q Where was the other man?
A Right behind him.
Q Right behind him?
A That's right.
Q All right, now, when did you first see these men?
A I seen them when they come around, just before they came in the front door.
Q So, you saw them as they walked in the front door?
A Yes.
Q Which one came in first?
A The man I identified.
Q Frank Chambers?
A That's right.
Q Is he the one with the khaki trousers?
A Yes sir.
Q What was the other man wearing?
A I don't know, sir.
Q Was the other man hiding behind the man that was there?
THE COURT: Oh, now,—
[fol. 15] MR. JOHNSON: Did you say something?
THE COURT: I was going to tell you not to be ridiculous with your questions.
MR. JOHNSON: I'd like an answer.
THE COURT: Let's get along.
A I don't know, whether he was hiding.
Q Did you see his face?
A No, I didn't.
Q Never saw his face?
A No.
Q How do you know he was a Negro?
A Probably by his hand and things.
Q You did see his hand?
A Yes.
Q How did you see—what did he do that drew your attention to his hands?
A Just the one glance I got of his hands.
Q But, you never saw his face?

A Never seen his face, no.
Q Did he say anything to you?
A No.
[fol. 16] The second man did.
Q I am talking—you never saw his face?
A No sir,—.
Q And except for his hands, which you observed to be of dark color, he could have been a white man, right?
A No.
Q Well, you said you said you didn't see his face, isn't that right?
A Right, that's right, I didn't see his face.
Q Didn't see what he was wearing?
A No.
Q Saw his hands, don't know whether he had a weapon or not?
A I don't, I didn't ask him.
Q While this happened, he was still standing behind the other man?
A It happened so quick, that I had no chance to see another man.
Q All right, you said something about you went into the back room then, is that right?
A That's right.
Q They asked you to go back there?
A He told me to go back, and he told me to go back in the room and open the safe.
Q Who said that to you?
A The man that had the gun on me.
[fol. 17] Q The second man go back, too?
A I guess he did, I was turned around, they said don't look at them, I didn't.
Q They said or one of them?
A It sounded like both of them when I was going to the back room, so I didn't look.
Q Now, there are four defendants on trial in this case, Mr. Havicon, I don't suppose that you can identify any of the other three?
THE COURT: Now, listen here, of course, he said, he only identified one. If you are going to continue your examination like this, we will never get through. Confine

it to the evidence. The only identified one, and he said that's all he could identify. You're getting into argument here with him. Please, let's get along with this case.

MR. JOHNSON:

Q How, did these men, do you know, how did they arrive at your place of business?
A No sir.
[fol. 18] Q How did they leave if you know?
A I don't know how they left, either.
Q You didn't observe them leaving?
A I was laying on the floor, how could I observe leaving?
Q You don't know, how they arrived?
A I don't know how they arrived.
Q They were on foot when you saw them?
A That's right.
Q You didn't see a car?
A No.
MR. JOHNSON: I have no further questions.
MR. BLUMENFELD: No questions.
MR. LEBOVITZ: Nothing.

MR. TAMBURO:

Q Mr. Havicon, you testified that at one time you were a policeman, is that correct?
A That's right.
Q How long ago was that?
A 1960.
THE COURT: I am assuming that you represent [fol. 19] the man whom he identified?
MR. TAMBURO: Yes, your Honor.

MR. TAMBURO:

Q How long were you a policeman?
A About a year.
Q Where were you performing your functions as a police officer?
A Swissvale Borough.

Q How long have you been an attendant for the Boron Oil Station, you were managing?

A Manager, I have been about three months.

Q Now, on the night of May 13, Mr. Havicon, two men entered your station, I take it this was on the early hours of Monday morning, is that correct, sir, Monday morning?

A I don't recall whether it was Monday morning or not, but I know it happened in the early hours of the morning of May 13.

Q And you were alone in the station at that time?

A That's right.

Q How long had you been on duty?

A Since twelve o'clock.

Q So, you had been on duty approximately 2½ hours, is that correct?

A That's correct.

Q And you usually worked an eight hour shift?

[fol. 20] A That;s right.

Q You were inside the station, two men came in?

A That's right.

Q Did the man whom you have identified today in Court have his gun out in the beginning or did he pull it out after he began talking with you?

A He pulled it out, I started to make change for him, and he pulled it out, then, and put it in my stomach.

Q Do you recall where he took the gun from?

A He had it in his waist.

Q Took it from his waist?

A That's right.

Q At this point, he demanded everything you had?

A That's right.

Q And you took money out of the cash register?

A No, we carry a changer on us, and bills in our pocket.

Q On the person, you had one of those changers with varying degrees of coins, quarters, nickels, and dimes?

A That's right.

Q Did you give him the entire changer?

A Changer and the bills I had on me.

Q And you gave him the wallet?
A No sir.
[fol. 21] After I give him the money, and changer, he ordered me to open the safe in the back room, which I did; then, he ordered me to lay on the floor and remove my trousers. They took my trousers and took my wallet from my trousers.
Q Did you see him take your wallet from your trousers?
A They took my wallet and trousers.
Q Did you see him take the wallet?
A No.
Q But, the wallet was in the trousers?
A It was in the trousers.
Q While the first man had the gun on you, and was taking the changer, you testified that the second man was behind him?
A Yes.
Q On Direct Examination you testified that you a quick glance at the man with the gun.
MR. MEANS: I object to that as not being accurate.
THE COURT: Yes, he did say a quick glance, I noticed that.
We want to find out the opportunity you had to observe him, Mr. Havicon.

MR. TAMBURO:

[fol. 22] Q You said a quick glance?
A I don't recall stating I had a quick glance.
THE COURT: I remember you did say that, so now you tell us what opportunity you did have to look at him.
A I had opportunity to look at him fully in the face.

MR. TAMBURO:

Q In other words, what you said on Direct testimony was not true, then, you had more than a quick glance?
A I don't recall saying that.
THE COURT: Mr. Havicon, you did say it, but, however, you explain, you can now explain.

MR. TAMBURO:

Q Tell us exactly how long you had?
A Actually,—
Q May I finish my question.
A Sure.
Q Tell us just exactly how long you did observe the man whom you now identify as having robbed you at the gas station?
[fol. 23] A Well, possibly, as the action happened and everything, possibly two or three minutes.
Q You observed him two or three minutes?
A Possibly that long.
Q During this period of time, you looked upon him at all times, you didn't take your eyes away?
A That's right.
Q You never saw the other man at all?
A I saw the other man's hands as I went down to the changer to make change for him.
Q And what were the lighting conditions in the station?
A Very good.
Q Brightly lit?
A Florescent lights.
Q Outside the station brightly lit?
A No, there was only four lights on outside, not what you would say real brightly lit.
Q Could you see a car or automobile that these men may have come in?
THE COURT: I didn't hear you.
Q Could you see—did you see an automobile or car that the men might have come into the station?
[fol. 24] A No.
Q You don't know whether there was a car or not?
A I do not.
THE COURT: Mr. Havicon, this is right in the City of McKeesport, is it?
A It is right coming in to McKeesport.
THE COURT: Is it built up there or was this section a build up section with the gas station there?
A It is pretty close to a cemetery, and it is not in

the main part of McKeesport, it is as you are entering McKeesport, like coming from Duquesne, from that area.

THE COURT: Well, go ahead.

MR. TAMBURO:

Q Now, you were alone there this evening, that's what you testified to earlier?

A That's right.

Q The lighting conditions were good, you observed the man had khaki on?

A That's right.

[fol. 25] Q I am a little vague as to the type of jacket, was it the coat type jacket, or like I have on, or what?

A It was the coat type, but gabardine, sort of gabardine coat.

Q More like what you are wearing?

A No, it would be a full coat type, but it is gabardine, with sort of large pockets on it, something like a summer coat jacket.

Q Did he have a shirt on underneath?

A Yes, I guess he did.

Q I don't want you to guess, if you know, say so; if you don't know, please say so.

A I don't know.

Q You don't know?

A No.

Q Are you certain of your testimony?

A Yes sir.

Q You haven't been guessing previous to this, have you?

A No, I am not guessing.

Q You just guessed this one time?

THE COURT: Please don't argue, let's get along with this case.

MR. TAMBURO:

Q Was the man wearing glasses or not?

[fol. 26] A No.

Q Was the man wearing a hat?

A No, not that I know of, he wasn't, no hat.

Q Can you testify whether or not for certain he was wearing a hat?

A He was not wearing a hat.

Q What was the length of his hair, if you recall, sir?

A I am not a judge on how long a man's hair is.

Q I don't mean in inches, did he have a crew cut, short cut or long hair or more like the Court Reporter here, I am just trying to find out whether or not he had long hair or had it cut short?

A It wasn't cut short.

Q Long hair, do you recall about how tall he was?

THE COURT: Wait a minute, you said long hair, he didn't say that. Would it be the ordinary hair cut any of us have?

A It would be the ordinary hair cut, I wouldn't say long, I am no judge of that.

THE COURT: All right.

MR. TAMBURO:

Q You recall how tall he was, sir?

[fol. 27] A I'd say approximately five foot nine, or five foot eleven.

Q You observed his face, was there anything in particular about him that makes you certain that the man that you identify was the same person that night?

A Just his looks, to look at him, I can tell it is the same man.

Q You can't pick anyone thing out that makes you more certain than not that he was the man?

A (No verbal response.)

Q May I have an answer?

A No.

Q Other than the time that this man was in the gas station, have you ever seen him before today—I mean, prior to the time he came into the gas station?

Between the time in the gas station and today in Court, have you ever seen the man you identified as being the man with the gun?

A Yes, I have.

Q When?

A In the other Courtroom.

Q When, sir?
A I don't know the exact date.
Q You mean in another trial?
A It was supposed to be this trial also in there.
[fol. 28] Q You saw him in a Courtroom, did you recognize him then?
A Yes sir.
Q You did, you knew who he was?
A Yes sir.
Q Did you ever see him any other time?
A No.
Q Did you appear at a Hearing wherein you brought the Information?
A Yes, I'm sorry, at a Hearing.
Q Did you see him at a Hearing?
A Yes, I did, I seen him right at the stand-up Hearing.
Q Did you pick him out of the line-up, a line of other men, point him out and identify him?
A Yes sir.
Q Where was this line-up?
A McKeesport.
Q At a police station?
A Yes sir.
Q When was that?
A The date, I don't know.
Q The month?
A I don't know what date it was.
THE COURT: Well, about how long after May 13th, [fol. 29] would it be, Mr. Havicon.
A I'd say ten or twelve days.

MR. TAMBURO:

Q About ten or twelve days after the robbery?
A Yes.
Q Prior to the time that you picked this man out of the line-up, or group of other men, had you discussed this case with the police?
A I reported the robbery.
Q Had the police questioned you about it?
A They took my statement on how it happened.

Q Did you pick him out during the night or day of the line-up, was it day time or night time?

A Day time.

Q The day that you were at the police station, did you talk to the police before you went into—did they tell you they were going to take you to a line-up to try and identify the man that robbed you?

A They told me there were four men in there and to see if I could identify one.

Q Who told you that?

A One of the detectives, from McKeesport.

[fol. 30] Q Didn't you spend a half hour talking with one of these detectives?

A No.

Q Didn't one of the detectives actually tell you that was the man with the gun?

A No.

THE COURT: I take it you will be able to disprove that, will you?

MR. TAMBURO: What?

THE COURT: You shouldn't ask that question unless you are prepared to disprove that, contradict him.

MR. TAMBURO: I have the defendant's testimony.

THE COURT: Disprove it in any way at all.

MR. MEANS: I don't understand how the defendant would know what the detectives told him.

THE COURT: He said he is going to disprove it by [fol. 31] the defendant, that's all right, go ahead.

MR. TAMBURO: I am trying to develop a line of questioning on cross examination to discredit some of his identification.

THE COURT: I understand what you are doing, I am only making a statement that you shouldn't ask questions which, if he denies, you are not prepared to disprove.

MR. TAMBURO: I see.

THE COURT: Because this is something which he was not asked about on Direct Examination by the Commonwealth, and now you are laying the ground work, I assume, for contradiction to impeach his credibility. He was not interrogated about this by the District Attorney.

Mr. Havicon, then, it amounts to this, so far as you know, you had never seen this defendant prior to May 13 and, of course, you didn't know him?.

[fol. 32] A That's right.

THE COURT: You didn't know him, is that right?

A That's right.

MR. TAMBURO:

Q My understanding now, Mr. Havicon, you saw this man three times prior to today; at the time you were robbed, at the time you identified him in a line-up in the McKeesport Police Station, and a third time, in a courtroom here in this Criminal Court, is that correct, sir?

A That's correct.

Q May I try now to more or less pin-point the time you saw him in the Courtroom, can you give us a month, was it this month, was it last month?

A This month.

Q You saw him sometime in September, is that correct, sir?

A That's right.

Q Can you tell us what Courtroom it was?

A Courtroom No. 8.

THE COURT: Up on the 5th floor, is that what you mean?

[fol. 33] A Yes sir.

MR. TAMBURO: That's all.

THE COURT: Anything further?

MR. MEANS: That's all.

THE COURT: Do you have a witness you want to get rid of? If you do, let's call him here, because the defense has asked for a continuance here and until Monday, and I don't want to bring these witnesses back if there is somebody you can get rid of within a reasonably short time.

JOSEPH T. REDDINGTON, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q Mr. Reddington, you are a police officer, employed by the City of McKeesport, is that correct?

[fol. 34] A That's correct.

Q And you are one of the officers who handled the investigation into the robbery testified to by Mr. Havicon, are you?

A That's correct.

Q Briefly, when did your police department learn of the existence of Mr. Chambers?

A On the 21st of May, we were notified by the North Braddock Police Department that they had four men in custody.

Q And did the North Braddock Police Department turn over to you, to your department, these cards belonging to Mr. Havicon, which are marked, Commonwealth Exhibit 2?

A Well, they showed them to us and kept them as evidence that they had confiscated when they searched the car connected with another—

Q Now, were the four defendants here eventually turned over to your police department by the other Municipality?

A That's right, after they completed their investigation and had given them hearings in Police Court.

Q After they were turned over to you, did you contact Mr. Havicon?

A That's right.

Q For what purpose?

A For the purpose of identification.

Q And when did you contact him and what happened?

[fol. 35] A On the 30th of May, the defendants were in our custody and we arranged a stand-up in the McKeesport Police Station. We brought Mr. Havicon to the

police station to ask him if he could identify any of the men as having been involved in the Armed Robbery perpetrated at the Boron Oil Company on the 13th of May, 1963.

Q And were these four defendants stood up before Mr. Havicon?

A That's correct.

Q And did he identify any of them at that time as being one of the men who robbed him?

A Yes, he did.

Q Who did he identify?

A He identified a man known as Frank Chambers.

Q Is that the defendant here?

A The last man of the four defendants here.

Q Did he pick Mr. Chambers out of the four?

A Yes, he did.

Q Now, Mr. Tamburo intimated that you or some detective told Mr. Havicon who to pick out, is there any truth to that, is that the way you run your line-up?

A That is not true.

MR. MEANS: You may cross examine.

[fol. 36] MR. JOHNSON: No questions.

MR. LEBOVITZ: No questions.

MR. BLUMENFELD: No questions.

MR. TAMBURO: No question.

MR. MEANS: Shall we call another witness?

THE COURT: You stated to me, you already told me that you are not going to go ahead, that one of counsel has an engagement this afternoon at two o'clock, and I assume that you are not going to go ahead this afternoon. All I was interested in was if you had somebody here that would be a short witness, that you didn't want to bring back on Monday, we'd hear the witness now.

MR. MEANS: I think we might get one more witness in of that nature.

THE COURT: All right. That is provided the de-

[fol. 37] fense don't want him back, will be willing to

excuse him, no sense of bringing the witness back. Well, they can be available if you want them. What do you say, it is now 25 minutes to one?

MR. MEANS: I understand that the witness I intended to call, Defense Counsel all want to have lengthy cross examinations.

THE COURT: Well, all right. Now, what is it you want to do here, I am perfectly willing to go ahead and the Jury is here this afternoon, but I understand that Mr. Blumenfeld—

MR. BLUMENFELD: Your Honor, that's correct. This case, as Your Honor knows, was listed earlier in the week, and I was prepared to go ahead, then this appointment that I have on a real estate closing was scheduled a long time ago and would inconvenience many people if I wasn't able to make it.

THE COURT: Well, all right.

[fol. 38] MR. MEANS: Well, of course, I have no objection if it will accommodate Mr. Blumenfeld, and what he says is true, this case was called earlier in the week, but as things happened, Mr. Johnson had another case, a Jury Trial scheduled ahead of this one this week, and he got into that and he was tied up, and it is not Mr. Blumenfeld's fault that we are still here today.

THE COURT: Well, then, Members of the Jury, that means we will not hear this case any further today, and of course, then, it logically follows you have to be back here on Monday morning when we resume the trial of this case, but you know what it is about, so let me advise you that you must not discuss it with anyone during the period of adjournment, nor allow anyone to discuss it in your presence. Don't hear anything about it until we resume the Trial of the case on Monday morning.

(Court adjourned at 12:35 P.M.)

[fol. 39] Pittsburgh, Penna.
September 30, 1963.

(COURT opened at 10:25 A.M.)

LINDA OSCHINICK, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q State your name?
A Linda Oschinick.
Q Where do you live?
A 641 Sixth Street.
Q Where is that?
A North Braddock.
Q How old are you?
A Fourteen.
Q Do you go to school?
A Yes.
Q What school?
A Jones Avenue.
Q What grade are you in?
[fol. 40] A Seventh.
Q Linda, I want to call your attention to May 20, 1963, last May, and ask you where you were that evening between 11:00 in the evening and 12:00 o'clock midnight?
A I walked—me and my friend, Jerry, walked my mother up to the store—
THE COURT: What?
A Me and Jerry Klaus walked my mother to her girlfriend's house, then, we walked back up to get her, then, me and Jerry decided to walk through Kroger's parking lot—
THE COURT: Wait a minute, you and Jerry, did you say?

MR. MEANS:

Q Who is Jerry?
A My boyfriend.
THE COURT: You walked your mother to her girlfriend's house, then, you went up to get her?
A Yes.
THE COURT: Then, what did you say?
[fol. 41] A Then, we decided to walk through the parking lot, Kroger's parking lot.

MR. MEANS:

Q By Jerry, you mean Jerry Klaus?
A Yes.
Q The young man here with you today?
A Yes.
Q Are you familiar with the gas station—
A Yes.
Q —at Sixth and Baldridge?
A Yes.
Q You live on Sixth Avenue, is that correct?
A Yes.
Q While you were walking around that night and in Kroger's parking lot, did you see anything unusual?
A There was a blue station wagon sitting there.
Q Sitting where?
A Parked in Kroger's parking lot.
THE COURT: What?
A A station wagon was sitting parked in Kroger's parking lot.

MR. MEANS:

[fol. 42] Q Linda, would you look towards the Jury and keep your voice up, they are having a little trouble hearing you, and could you see anyone in this station wagon?
A Yes, there were four colored men in it.
Q Approximately, what time of the evening was this?
A It was about 25 after eleven or 11:30.
Q Did you notice how long the station wagon stayed there and what it did?
A Well, after we hit the bottom of Kroger's parking lot to walk up toward my house, they pulled out and were circling around the corner a couple times.
THE COURT: What?
A They pulled out and were riding back and forth the street a couple times.
THE COURT: I don't understand, riding back and forth the street a couple times?
A They kept circling around the block a couple times.

MR. MEANS:

Q As they circled around the block, would there direction of travel take them by this gasoline station at the [fol. 43] corner of Sixth and Baldridge?

A Yes, they'd go right passed it.

Q And approximately how many times did they circle around this block?

A About five or six times.

Q Then, what occurred?

A Then, we went back, we went up to my Dad's car to lock it.

THE COURT: Went up where?

A Went to the back yard to lock my dad's car.

THE COURT: You and your boyfriend, Jerry?

A Yes.

THE COURT: Your back yard?

A Yes.

MR. MEANS:

Q Did you see this light blue station wagon again that evening?

A Yes, it went up the hill, then, it turned around and went back in Kroger's parking lot, and that's when the robbery happened.

Q You didn't see the robbery, did you?

A No.

[fol. 44] Q Tell us what you did see, you say the car was in the parking lot, left, and circled around the block a couple times?

A Yes.

Q Then, came back to the parking lot?

A I am not sure it came—it went back to the parking lot, but it went toward the parking lot way and then it was about ten to twelve or five to twelve, that's when the robbery happened, we seen a man run out the gas station and said it was robbed, then we seen the station wagon pull out and go down towards Braddock.

Q Pull out from where?

A Kroger's parking lot.

Q Linda, how far is your home from this gas station that was robbed?

A About a block, not even a block.
Q How far is this Kroger's parking lot from the gas station?
A Right across the street.
Q Across the street?
A Yes.
THE COURT: From your house?
A Yes.

MR. MEANS:

[fol. 45] Q Across the street from your house or across the street from the gas station?
A Across the street from my house and from the gas station.
Q Is it on the same side of the street as the gas station?
A No.
Q Across the street from the gas station?
A Yes.
Q And on what street is Kroger's parking lot?
A Sixth Street, I think.
Q At this time of the evening, was the store open?
A Yes, it was open.
Q Was it open at 11:30?
A Yes—no.
Q Kroger's store?
A Kroger's was not open.
Q By the store, I don't mean the gas station, I mean Kroger's store.
A No, they close at nine o'clock.
Q Were there any other cars in the parking lot?
A Yes, from C. A. Clark.
THE COURT: What?
A C. A. Clark Car Dealer.
[fol. 46] THE COURT: Well, he asked you if there were other cars in the parking lot?
A Yes.

MR. MEANS:

Q Was anyone in these cars?
A No.

Q Just parked over night?
A Yes.
Q Then, after you saw this man come running out and say the gas station was robbed, did you go over there?
A Yes.
Q And did you tell the police what you had seen?
A Yes.
Q As I understand it, you cannot identify any of the four colored men you saw in the car?
A No.
Q Could you see any of the clothing that they were wearing?
A We seen one was wearing a light trench coat and one wearing a green sweater.

CROSS EXAMINATION

MR. JOHNSON:

[fol. 47] Q Linda, how close did you come to this car?
A It rode right passed us.
Q Where were you?
A We were standing in front of my house.
Q On Sixth Street?
A Yes.
Q Is that the closest you ever were to the car?
A Yes, besides walking past it in the parking lot.
Q How close were you when you walked past it in the parking lot?
A We weren't too close to it.
Q Were you close enough to see how many men were in the car?
A Yes, we seen there was two in the front and two in the back.
Q Why were you walking through the parking lot?
A We just decided to take a walk through.
Q Is the parking lot large?
A Yes.
Q Was there many cars in it?
A Yes.
Q Do you know that they were all empty?

A Yes, they were all empty because that's—

Q Wait a minute, do you know that, or are you just guessing it, did you see in all the cars?

A No.

[fol. 48] Q You don't know whether they were empty or not, do you?

A No.

Q How close did you come to the blue car, the blue station wagon?

A Not very close to it.

MR. MEANS: At what time?

MR. JOHNSON: When she was walking through the parking lot.

MR. JOHNSON:

Q Not very close to it?

A No.

Q But close enough you could see there were men in it?

A Yes.

Q Did you speak to them?

A No.

Q Did they speak to you?

A No.

Q Was the blue car or the blue station wagon, was it parked on the Sixth Street side of the lot or parked in the back end of the lot?

A It was parked right in the parking lot.

Q How far from the filling station was it parked?

[fol. 49] A It was far away from the Gulf Station.

Q How far?

A Probably a block.

Q Now, you testified a little while ago, Linda, that the parking lot, Kroger's Parking lot was across the street from the Gulf Station?

A Yes.

Q Is it right across the street from the Gulf Station?

A No, but the Gulf Station is here and there is another gas station across the street, but a little up from the Esso Station, that's where Kroger's parking lot is.

Q From the Esso Gas Station?

A Yes.

Q Is it on the same side of the street as the Gulf Station?

A No.

Q It is on the other side of the street?

A Yes.

Q Can you see the Gulf Station, not the Esso Station, can you see the Gulf Station from the Parking lot?

A If you are on the street, if you are on the sidewalk, you can.

Q Could you see the Gulf Station from the place where the blue station wagon was?

A No.

[fol. 50] Q You couldn't?

A No.

Q It was back into the lot?

A Yes.

Q Now, you walked through the lot, didn't you?

A Yes.

Q You weren't on the sidewalk, you walked through the lot?

A Yes.

Q Now, you also say, you live on Sixth Street?

A Yes.

Q Do you live in the same direction as the Kroger store or toward the filling station?

A We live in between both of them.

Q You live in between the Kroger store and the filling station?

A Yes.

Q Were you on your way home when you were walking through the parking lot?

A Yes.

Q Do you live on the same side of the street as the Gulf Station or the other side?

A The other side.

Q That's the same side of the street as the Kroger Store?

A No, it is across.

[fol. 51] Q Kroger store is on the same side of the street as the Gulf Station?

A No, there is four blocks and the Gulf Station is here and I live on the other side and Kroger's is on this side.

Q Kroger is on the same side of the street as the Gulf Station?

A No.

MR. MEANS: I object to the question as being repetitious, she said six times between Direct and Cross Examination that it was across the street from it.

THE COURT: Well, frankly, I am getting a little bit confused. They are mentioning an Esso Station and a Gulf Station, and I just am not clear on this. Which station is alleged to have been robbed here, which one, the Gulf or Esso?

MR. MEANS: The Gulf.

THE COURT: Go ahead.

MR. JOHNSON:

Q You say the Esso Station is across the street from [fol. 52] the Gulf Station, right?

A Yes.

Q The Kroger store is across the street from the Gulf Station but down about a block, is that right?

A Yes.

Q It is across the street and down about a block?

A Yes.

Q And you live on the same side of the street as the Gulf Station?

A No.

Q You live on the same side of the street as the Kroger store?

A No.

Q Isn't the Kroger store on Sixth Street?

A Yes, but it is across the street from my house.

THE COURT: You live on the same side of the street as the Gulf Station, do you?

A No.

THE COURT: Well, the Gulf Station and Kroger store on the same side of the street?

A No, they are across the street from each other.

MR. JOHNSON:

[fol. 53] Q Does the Kroger store face Sixth Street?
A Yes.
Q And the Gulf Station faces Sixth Street?
A Yes.
Q And you live on Sixth Street?
A Yes.
Q And the Kroger store is across the street from the Gulf Station?
A Yes.
Q Down about a block?
A Yes.
Q Is the Kroger store across the street from your house?
A Yes.

MR. MEANS: May I remind Counsel that he is dealing here with a four-way intersection, and he keeps in mind the fact there are two street intersecting each other and that you can be across—

MR. JOHNSON: I object to the statement counsel is making.

THE COURT: Well, let's go ahead.

MR. JOHNSON: If he wants to be sworn, I have no [fol. 54] objection.

THE COURT: Please, wait a moment, Gentlemen, let's go ahead,—ask the question. The thing is, you have been asking so many questions here, I have become confused as to where it is.

THE COURT:

Q Suppose I ask you and get the thing straightened out. You live on Sixth Street?
A Yes.
Q And you live across the street from where?
A Kroger's parking lot.
Q From Kroger's parking lot, and now, where is this Gulf Station as you face Kroger's parking lot, to your right or your left?
A (No verbal response.)
Q Let's put you in front of your house facing Krog-

er's, which way is the Gulf Station, to your right or your left?

A To my right.

Q Is it across the street from you on the same side as Kroger's?

A What the Gulf?

Q Yes.

A No, it is across the street.

[fol. 55] Q It is on your side of the street, is that it, it's got to be one or the other?

A I don't live on the same side as Kroger's and I don't live on the same side as Gulf, they are on the same side of the street.

Q They are both on the same side, Gulf and Kroger's, on the opposite side of the street from you, is that it?

A Yes.

Q But, you say the Gulf is about a block away from the Kroger parking lot?

A Yes.

THE COURT: Well, I think that's clear enough.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: All right.

MR. JOHNSON:

Q Can you see the Gulf Station from the front of your house?

A Yes.

Q Can you see the Kroger parking lot from the front of your house?

A Part of it.

Q Now, you testified, Linda, that a man, as I understood it, a man came running out of the Gulf Station and [fol. 56] indicated that he had been robbed, is that true?

A The man from the Esso Station come running out and said that the Gulf is robbed.

Q A man from the Esso Station came out and said the man from the Gulf Station had been robbed?

A Yes.

Q Where were you when he said this?

A On my porch, sitting.

Q On your porch, sitting?

A Yes.
Q Jerry still with you?
A Yes.
Q What did you do then?
A I told him, "Let's go across the street and see what happened."
Q Told Jerry that?
A Yes.
Q Where did you go?
A We went over to see, the cops pulled in, then I said, "let's go."
Q Wait a minute, where did you go?
A We went over by the gas station.
Q Which one?
A Esso.
[fol. 57] Q The Esso Station?
A Yes.
Q What happened when you got there?
A I heard the people saying that the Gulf Station was robbed.
Q That's the second time you heard it?
A Yes.
Q Then what happened?
A Then, Jerry said, "Let's not stand here because we might get in trouble or something." And so, then, we decided that we'd go then,—then, the cops came along.
Q You decided what?
A That we'd go over my house then.
Q So, you went back to your house then?
A Yes.
Q Then what happened?
A Then, the cops come and asked us did we see it?
Q They came to your house?
A No, on our way down to our house, they come.
Q You were walking on the street?
A Yes.
Q What did they ask you?
A They asked us did we see anything?
Q What did you say?
[fol. 58] A We said we seen a car but that's all.
Q You said you saw the car?

A Yes.

Q Now, Linda, how do you know that the blue car was the car?

A Because it kept circling around.

Q Did you see anybody get out of the blue car?

A No.

Q Did the blue car go into the Gulf Station?

A No.

Q I ask you again, how do you know that the blue car was the car?

THE COURT: She said because—she just surmised it, because it circled around, that's the reason she came to that conclusion, she wouldn't know it was the car, that's her conclusion.

MR. JOHNSON:

Q Do you recall what type of car it was?

A It was a light blue station wagon.

Q Do you recall the make?

A No.

Q The year?

[fol. 59] A It looked like it was about a '63 or '62.

Q But you don't recall the make?

A No.

Q At no time, Linda, did you see any of the men who were in the car, out of the car?

A No.

THE COURT: Well, do you have any further questions?

MR. JOHNSON: I have nothing further.

MR. BLUMENFELD:

Q Linda, from where this car was parked, in the parking lot, as you were walking through, the occupants of that car; could not have seen the Gulf Station, is that right?

A No.

MR. BLUMENFELD: That's all.

MR. LEBOVITZ:

Q When you said, "No" you meant they could not have seen, is that correct?

A Yes.
Q You meant, no, they couldn't see?
[fol. 60] A Yes.
MR. TAMBURO: No questions.

JERRY KLAUS, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q What is your name?
A Jerry Klaus.
Q Where do you live?
A 28-F, Hawkins Village, Rankin.
Q How old are you?
A Seventeen.
Q You go to school?
A No.
Q What do you do?
A Unemployed.
Q You are the Jerry that Linda has been referring to as being with her on the evening that has been under discussion, May 20?
A Yes.
[fol. 61] Q Beginning at the time she testified to when you first saw this automobile, tell us where you were, and what you saw?
A We was coming down from Penn Street, North Braddock, where her mother was at, and her mother kept on walking down Baldridge and we cut through the parking lot.
Q Jerry, speak louder, and look over here, speak up so the people can hear you.
A Anyhow, we walked through the parking lot and there was a car there and, you know, we just happened to look over there, because none of the other cars had any people in it, and we looked over there and I couldn't tell if it was, all I seen it was four boys.

THE COURT: What?

A I seen four boys in the car, and then, we kept on walking, and we walked down to the corner, cut up on the sidewalk to her house, then, we went in, then, as we was sitting on the porch, this blue station wagon kept going up the street, then turning around, coming back down and go up again and turn around and come back. So, we went up to lock her father's car, and the car turned up—

Q By the car, you mean the station wagon?

A Yes, the blue station wagon went up the street and [fol. 62] turned around and came back down past her house, and we went over and sit on the porch. Then, about ten minutes after the car went back down towards the parking lot, this here man came running from the Esso Station and saying that the Gulf Station had been robbed. So, then, right after that, I seen this here same blue station wagon come out of the parking lot and go towards Braddock, going about 45 or 50 miles per hour. She said, "Let's walk over and see what's going on."

THE COURT: Wait a minute, was this after the man came out of the Esso Station and said that there had been a robbery at the Gulf that you saw—did you see the blue car again?

A Yes.

THE COURT: It was after that you saw it?

A It was about, I say, about 15 or 20 seconds before that?

THE COURT: Before what?

A Before the man came running down the street saying the gas station was robbed.

THE COURT: That's what I wanted to get, then [fol. 63] you saw the blue station wagon, what?

A Going down Sixth Street towards Braddock.

MR. MEANS:

Q When you say this, as I understand, you saw this car pulling out, go down Sixth Street, toward Braddock at 45 to 50 miles an hour?

A Yes.

THE COURT: Did you say pull out from where?

A Kroger's parking lot.

MR. MEANS:

Q Now, you had seen it ten minutes or so before in the Parking lot, is that correct?

A Yes.

Q And you saw it go up and down the street several times?

A Yeah.

Q And then, it came out of the parking lot and headed towards Braddock?

A Yeah.

Q And then, 20 seconds after that, the man ran down and said there had been a robbery?

[fol. 64] A Yeah.

MR. MEANS: You may cross examine.

MR. JOHNSON: I have no questions, Your Honor.

MR. BLUMENFELD: Nothing.

MR. LEBOVITZ: Nothing.

MR. TAMBURO: Nothing.

MR. MEANS:

Q While you are here, I will ask one more question. When the automobile pulled out of the parking lot to go towards Braddock on Sixth Avenue, would it go by the Gulf Station again or would it go away from it?

A It is going away from it.

MR. LEBOVITZ: No questions.

Stephen KOVACICH, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

[fol. 65] MR. MEANS:

Q Where do you live?

A 53 McKueon Street, Braddock.

Q Are you employed?

A I am employed at the Gulf Station.

Q Where is that station located?

A Sixth and Baldridge, North Braddock.

Q Were you on duty at that Service Station on the evening of May 20, 1963?

A Yes, I was.

Q Were you robbed there that evening?

A Yes.

Q What time did this occur?

A About a quarter to twelve.

Q Were you the only employee on duty or was somebody else around?

A Just me.

Q And was the station open for business at this time?

A Yes.

Q Tell us what happened?

A Well, I was taking out the oil cans—

THE COURT: What?

A Taking oil cans out of the oil rack out in the island [fol. 66] there, taking out the empty oil cans, and I heard foot steps. And so, I looked around and there was two men behind me.

MR. MEANS:

Q Was this outside?

A Right out there, out at the island, going down Sixth Street Hill.

Q Is this where the pumps are?

A Yes, that's the only pump lit there.

Q You turned around, and there were two men?

A Two men behind me. So, they approached me, one had a gun under the sweater, like he pulled it up and showed it to me, and I turned around and started walking toward the office. I started walking pretty fast and the one said, "Slow down." I got inside the office, I started reaching in my pocket, again he said, "Whoa, what are you doing," and I said, "Get the key out to open the register." I got the key out to open the register —now, wait a while, when I came in the office, they both pulled their guns out, one was standing on this side with a gun and the other standing on that side with the gun.

Q Go ahead.

A So, they took the bills out, and I had my glove there, and I put the change in the glove.

[fol. 67] Q Is this from the register?

A From the register, yeah, they asked me what was—

THE COURT: Did you put the change in the glove?

A Yeah, the small change.

MR. MEANS:

Q By glove, what do you mean?

A It was my glove, a right hand glove.

Q Go ahead.

A They got that money, then, they asked me for my wallet, I said, "I don't carry a wallet," and then, they asked me what was in the back room, and I had a little money back there that I took out of the register. So, we went in the back room, I gave them that to them and I stood there and waited until they got out, I stood in the back room for a while, give them time enough to get away. When I figured they got away, that's when I came out and called the police.

Q Now did both of these men have guns?

A Yes, they did.

Q Would you know one of these or both of these guns if you saw them again?

[fol. 68] A Yes.

Q I show you one gun identified as Commonwealth Exhibit 1, and ask you if this looks like the gun that was put on you that evening?

A That's the one.

Q I show you what is marked for identification as Commonwealth Exhibit 3, it is a weapon, and I will ask you, if that is the other gun which was carried?

A Yes, that's the one.

THE COURT: Well, now, does it just look like it or is that it?

A It is a .38.

THE COURT: I know, but they are lots of .38s, does that resemble the gun you saw there?

A That's what I got held up with, the same color as that, the .38, and the one right there.

THE COURT: These look like the same guns?

MR. MEANS:

Q You didn't take the serial numbers down?
[fol. 69] A No, naturally.

THE COURT: That's what I am trying to let the Jury understand, that they just resemble the guns that you saw?

A That's right.

MR. MEANS:

Q Now, you gave these men some change from the register, is that correct?

A Yes.

Q And you put it in a glove, how much change was there, approximately, do you know?

A I wouldn't know how much change.

Q I show you Commonwealth Exhibit 4, which is a glove filled with change, and ask you is that your glove, is that the glove you gave the robbers?

A Positive.

Q And is this the way it looked when you handed it to them?

A Right, it is a brand new glove, I just used it a few times that night, I just brought it to work.

Q There is a gum band around the top of it; is this the way you left it or has that been put on since?
[fol. 70] A It was put on since.

Q When you gave it to them, was the glove open on top without the gum band, and you put all the change from the register in there, is that correct?

A Well, some fell on the floor, that's when I got nervous and shaky and I dropped some of the change because two .38s pointing at you, you're bound to get nervous.

Q Now, when I opened this up, there is a card, a man's card in there, Mr. Murphy's card, I understand you didn't give them that?

A No.

MR. MEANS: We will offer this exhibit in evidence at this time, Commonwealth Exhibit 4, the glove.

MR. JOHNSON: Your Honor, I object to it being admitted, and entered into evidence at this time. There

is no connection between this glove at this point and any of the defendants.

MR. MEANS: He may have a point, I will hold it off.

[fol. 71] THE COURT: All right.

MR. MEANS:

Q Now, Mr. Kovacich, these two men, how long were they with you at the gas station during this robbery?

A I guess about three to five minutes, in around there.

Q And was there anything that you could distinguish between the two of them, any way you could distinguish between the two robbers?

A Well, the short one had a green pull over sweater, wearing a hat and khaki pants.

Q The short one had a green—

A Khaki sweater—I mean, green pullover sweater and khaki pants, army pants.

Q Anything else about it?

A Mustache, hat.

Q Wearing glasses or anything?

A Not at the time, he wasn't wearing glasses.

Q Which one had which gun? Which one did the shorter one have?

A The small one had the gun right there, the short one.

Q Which one?

A Like that chrome one.

Q The short one had Commonwealth Exhibit 1?

[fol. 72] A That's the one,

Q So, I will take it the other one had the dark blue gun?

A Yes.

Q You say one was short, was the other one taller?

A About five ten or five eleven, about my height.

Q How was the other one dressed?

A Cap, mustache and a trench coat.

Q What color trench coat?

A Light brown, you know, like a beige, something like that.

Q And this trench coat, was it a full length coat, or a jacket type coat?

A About three-quarter, came up around here some place, wasn't all the way down.

MR. MEANS: Let the record show that he has indicated a point—

A About up to here.

MR. MEANS: About three inches above his knee or so.

MR. MEANS:

Q Now, after you gave them the money from the register, this change, did you give them dollar bills from the register?

[fol. 73] A They took the bills out their selves.

Q You know how many bills were there that they took, approximately?

A Well, a ten, two fives, a two-dollar bill, and 15 ones.

Q A two-dollar bill?

A Yes, and a dollar thirty cents in the back.

Q There was a ten-dollar bill?

A Two fives, and a two-dollar bill, and 15 ones.

Q Then they took you to the back room?

A Back room.

Q What was back there?

A There was three ones back there and tens, or fives with the rest of the $45.00.

THE COURT: What?

A I had three one-dollar bills and the rest was made up of tens or fives, that made a total of $48.00 I had in the back.

MR. MEANS:

Q Among this, were three one dollar bills?

A Yes.

Q And do you know what the other denominations were?

A Well, they were tens or fives, but I couldn't say say how many tens or fives there were.

[fol. 74] Q Now, as I understand what you have told me, you cannot today identify either of the two men that came into your gas station?

A Right.

Q The day after this robbery, were you asked to look at some men to determine whether you could identify them?

A The next day, they brought me up to the Squire's Office.

Q Who brought you up there?

A The North Braddock Police brought me up to the station.

Q The police came to see you?

A Yes, they took—

Q They took you to the Justice of the Peace Office?

A Yes.

Q For what purpose?

A See if I could identify any of the four men.

Q Were there four men up there?

A Yes.

Q Did you look at them?

A Yes.

Q Were you able to identify any one that day?

A I identified Chambers then.

Q This was the day after the robbery?

A Yes.

Q Now, today, you say you cannot identify Chambers?

[fol. 75] A No, because—

Q Would you explain this, if you can?

A When he held me up, he had a hat, a pull over sweater, and khaki pants, wasn't wearing no glasses, had a mustache, his hair was a little long. Now, he is wearing glasses, dressed up, got a suit and no mustache.

Q While you are under oath, you are not going to say positively that's the man that robbed you, is that right?

A Well, —

Q All right, I appreciate your honesty. After these men took you to the back room and you gave them $48.00, what happened?

A Well, I stood in the back, I waited they got away;

when I figured they got away, that's when I phoned the police.

Q The phoned the police, did you, do you know how the person from the Esso Station found out you had been robbed?

A I went over and told him.

Q You told him; did you see where these men went, after they left the gas station?

A No, I stood in the back room and waited until they got out of there, and that was it, I wasn't about to go out there and see where they were going, no sir, not me, I'm not armed, and I ain't going to go out there to look for any trouble.

[fol. 76] Q How often do you get a two-dollar bill in in your gas station?

A Very often, I like to get rid of them.

THE COURT: He asked you how often do you get a two-dollar bill?

A He means do I get a two-dollar bill every day or every week?

THE COURT: That's right.

A I very seldom get a two-dollar bill.

THE COURT: That's what he asked you.

MR. MEANS:

Q As I understand your testimony, you did have one in the register?

A Right.

Q And it was taken by the robbers?

A I left it in there with the ten and two fives and a two dollar bill because I wanted to get rid of it, it's bad luck, I don't care to have it around, that's my opinion, I don't know how you look at it.

THE COURT: Now, please—

MR. MEANS: Cross examine.

[fol. 77] CROSS EXAMINATION

MR. BLUMENFELD:

Q It was your bad luck that day, wasn't it?

A I'm afraid it was.

MR. JOHNSON:

Q Mr. Kovacich, you say there were two men with two guns, is that correct?

A Right.

Q You observed these men, observed what they were wearing? One had a green sweater, khaki pants, and mustache, no hat, glasses, is that correct?

A Right, at the time that I was held up.

Q Another fellow had a trench coat, mustache—you got a pretty good look at them, didn't you?

A Well, I had my eye on one when he showed me the gun here, that's the one I noticed first, he picked the sweater up, he didn't pull it out, he showed it to me.

Q You got a pretty good look at these men?

A Yes.

Q And yet, you cannot identify them as any of the four defendants in this Courtroom?

A Nope.

[fol. 78] Q Could it be that none of the four defendants in this Courtroom were the fellows that were there?

A That's pretty hard to say at the time.

Q What a minute, just a minute, don't you think that might be why you can't identify them?

A If you say they weren't there—

MR. MEANS: Objection, it calls for a conclusion on the part of the witness.

THE COURT: Sustain the objection.

(Exception noted.)

A Well, I got held up—

THE COURT: Wait a minute.

MR. JOHNSON:

Q You got a good look at these men, the two men that were there that night, you observed their clothing and so forth?

A Right.

Q Got a good look at them?

A Right.

Q You can't say they are any of the four men in Court here today?

A I can't make it out.

[fol. 79] Q What is your answer, you can't say that they were the men that were there?

A What I am trying to tell you is that, —

Q Wait a minute, answer my question.

A I got a question, too, because they held me up—

THE COURT: Just a minute, stop the yelling here.

A Them fellows held me up—

THE COURT: Wait a minute, you mean you cannot be sure now or certain it was any of these four men, here, is that what you are telling us, you can't be certain.

A No, I ain't certain about it.

THE COURT: All right.

MR. JOHNSON: I am going to ask my question, Your Honor.

MR. JOHNSON:

Q Can you identify any of these men here as the men that were at your filling station that evening?

[fol. 80] THE COURT: He already answered, he said—

MR. JOHNSON: Your Honor, I object to the use of the word, "certain" in the Court's question.

THE COURT: Can you identify any of them here?

A No.

MR. JOHNSON:

Q Now, your testimony at the prior trial, Mr. Kovacich, was that only one man had a gun, isn't this correct?

A When they approached me.

Q Answer my question, yes or no?

A When he approached me, he had it there, the gun was here, and the other fellow, he had his coat—when a man carries a gun in his jacket, the one side if usually heavy, leans down more.

Q Please answer my question.

A Yes, yes.

THE COURT: Just a minute, this is a proceeding [fol. 81] here in Court, there must be some decorum

about the matter. I want this yelling around here stopped. If it doesn't stop, there will be trouble for somebody.

MR. JOHNSON:

Q Would you answer my question?

THE COURT: The case was on trial here before, did you state at that time that only one man had a gun or did you state they both had a gun in the previous trial, do you recall that?

A Both men had a gun.

THE COURT: Did you so state at the other trial?

A At the first time I was held up, there was only one gun the fellow had here.

THE COURT: No, no, you don't understand the question. Were you in here as a witness before?

A Yes, I was in—

[fol. 82] THE COURT: Not this Courtroom.

A I was down the other end, I don't know what Courtroom it was.

THE COURT: Well, were you in this Courthouse before at a previous trial, were you here before?

A Yeah, yeah.

THE COURT: All he wants to know is whether you said at that time that only one man had a gun, or did you say that both had guns, don't you understand my question?

A They both had guns.

THE COURT: Did you so state that way at the other trial, did you testify at the other trial to that effect that they both had guns, do you remember?

A (No verbal response.)

THE COURT: Well, all right, if you don't remember, let's get along.

MR. JOHNSON:

[fol. 83] Q But you are stating today, Mr. Kovacich, the second man had this weapon here, as I understood your testimony on Direct Examination?

A Right.

Q You don't recall that you testified at the prior trial

that the second man had his hand in his pocket and you assumed that he had a gun there?

A Naturally.

Q And I believe you don't recall then that you said you didn't see the second gun?

A You mean the first hold up?

Q There was only one hold up at your station.

A You mean the first time?

Q The first trial, yes.

A I might have not seen the gun, but the one fellow had a gun here.

Q We are not questioning your testimony regarding this weapon marked Commonwealth Exhibit 1, I am talking to you in regards to this weapon identified as Commonwealth Exhibit 3, and asking you about the testimony that you gave at the prior trial, and I will ask you the question again.

Isn't it true that you said then that you didn't see the second gun, the man had his hand in his pocket, but you [fol. 84] didn't see the weapon, isn't that what you said?

A The man had his hand in his pocket, yeah, I didn't see the weapon.

Q Yet, this morning, you are identifying the weapon as the weapon the second man carried?

A Inside the station, they both had their guns out.

Q Now, you are saying today that you didn't say that the other day?

A Inside the station, they both had guns out.

Q All right. Now, at the prior trial of this case, Mr. Kovocich, I believe you testified that the amount of money that had been taken was $211.00 and some cents, isn't that correct?

A The boss's estimate.

Q And this was the amount that you reported as having been stolen and testified to at that trial, isn't that correct, and I believe the prosecutor, Mr. Schmitt, asked you if you could identify some currency that had been marked as a Commonwealth Exhibit as being the currency taken from your cash register, and you said you could not identify it, isn't that correct?

A Yeah, I guess that is there.

Q But, today, you say you had one ten dollar bill, two five dollar bills, one two-dollar bill and 15 one-dollar bills?

A Correct.

[fol. 85] Q And I total that to be a total of $37.00.

A Uh huh.

Q And you say you had $48.00 in currency taken from the back room?

A Right.

Q This is contrary to testimony you gave at the prior trial, isn't that correct, when you stated you had $211.00. We have the Transcript of this other case—

THE COURT: Well, if you have the Transcript—

MR. JOHNSON: It is in the process—

THE COURT: Mr. Johnson, if you have the Transcript there is one way to interrogate the witness—

MR. JOHNSON: May I approach the Bench?

THE COURT: Will you please wait until I finish my instruction to you.

MR. JOHNSON: Yes.

THE COURT: I don't like your conduct in this case, [fol. 86] you better quiet down in this case, I happen to be running this case. If you and I want to get along all right, you will have to purport yourself a little differently. If there is testimony here and it has been transcribed from the previous trial, there is one way to ask him, ask him whether he wasn't asked this question and whether he didn't give this answer.

MR. JOHNSON: May I approach the bench?

(A side bar conference was had.)

MR. JOHNSON:

Q Mr. Kovacich, what has happened since the date of the last trial, which I believe was the first week in September, that has caused you to change your testimony regarding these matters?

THE COURT: Well, now, no, no, you better specify where and how?

MR. JOHNSON: All right.

MR. JOHNSON:

Q Isn't it true, Mr. Kovacich, that you testified that [fol. 87] the loss that the filling station had suffered was $211.00?

A That's the boss out there, when he checked it out, that's what he said. Usually, I come to work, I don't check what was in the register, I put a certain amount in the back room and I keep enough change in there, I don't carry that much business in the night turn.

Q You testified at the prior trial the amount stolen was $211.00?

A That's what the boss claimed.

Q You testified—

A That's what I said, about two hundred some dollars.

Q This was the amount lost?

A Yes.

Q Now, you are saying today that wasn't the amount of the loss, isn't that correct?

A I mean, I didn't check the papers he kept in back of the register, he got a little card—cards and that there, I don't check that stuff.

MR. JOHNSON: Your Honor, I ask the Court to instruct the witness to answer the question.

A What I am trying to explain, unless he kept a check back there, I never took no notice of it.

[fol. 88] THE COURT: You have identified here the the amount of bills, you have stated—let's put it this way, the character of the bills that were taken, fives and tens and ones and a two.

A Yeah.

THE COURT: Now, your testimony at the previous trial, you say you just stated $211.00 because the boss said that was how much was taken?

A Yes.

THE COURT: You are now telling us all you knew was taken was the amount you have given us here, is that it?

A Yes.

THE COURT: Now, What is this about there may may have been some more back of the register?

A I don't know what was back there unless he keeps papers there or something.

[fol. 89] THE COURT: Well, all right, but you did testify at the previous trial $211.00, is that it?

A Yes.

MR. JOHNSON:

Q Isn't it true, Mr. Kovacich, that you also testified at the prior trial, that the amount that was in the back room was $50.00, you now testify it was $48.00?

A I don't write all the stuff down, you could ask me all kinds of questions, get me confused here, I am not good at this game.

Q The testimony regarding this currency were not brought out on cross examination at the prior trial, they were brought out in direct examination, you testified you had $211.00, of which $50.00 was from the back room. What I want to know today, and I say this sincerely, I want to know what has happened in the last three weeks that has caused you to change your testimony? We only want the truth, and if something has happened, I wish you'd tell us about it.

MR. MEANS: Well, I object to the question, counsel is assuming at this point that his recollection of what was [fol. 90] said in the trial is better than the witness's, and he is implying that the witness, for some foul reason, has changed his testimony in some detail, which could easily happen. I object to this question.

MR. JOHNSON: I think these matters are very material.

THE COURT: Let's not indulge in any argument, I think I am able to rule on the matter. You say that he has changed his testimony; well, he said that he has given you his reason for saying before $211.00, because the boss said that's how much. So, I think you have the right here to put somebody on the stand, if you wish to, and show just exactly what he did testify to at the prior trial, if you wish to do it, and you can argue to the Jury in any way you want to on the matter.

MR. JOHNSON: Very well, Your Honor.

MR. JOHNSON:

[fol. 91] Q Did you remain throughout—for the entire length of the prior trial, Mr. Kovacich?

A I was there, I think, until I left in the afternoon, I think.

Q Do you recall hearing the defendant Raymond Lawson testify?

MR. MEANS: I object to that.

THE COURT: We will sustain the objection.

(Exception noted.)

MR. MEANS: It is far beyond the scope of direct examination.

THE COURT: Sustain the objection, let's get along, please.

MR. JOHNSON:

Q Now, you testified this morning Mr. Kovacich, that the day after, at the Hearing, you identified Frank Chambers?

A Right.

Q And one of the two men who robbed your service station?

A Right.

Q You identified him at the police line-up?

A Uh huh.

Q Then, isn't it true that when this trial—when this [fol. 92] case came for trial originally, you were unable to identify him that day in the Courtroom?

A Yes.

Q And you are unable to identify him today?

A Yes.

Q Or any of the other three men who are with him?

THE COURT: YOU have asked him that a number of times, he said he cannot identify any of them.

MR. JOHNSON: Nothing further.

MR. BLUMENFELD: No questions.

MR. LEBOVITZ: No questions.

MR. TAMBURO: No questions.

RE-DIRECT EXAMINATION

MR. MEANS:

Q I want to clear up one thing. Now, Mr. Kovacich, —on this question of identification, would you clarify what you mean when you say you can't identify them?

MR. JOHNSON: I object to that, Your Honor.

[fol. 93] THE COURT: Overrule the objection, if he has any explanation to make, allow an exception, go ahead.

A The day he held me up there, he had a hat and his hair was longer and had a mustache, a pull over sweater, and khaki pants.

MR. MEANS:

Q You have explained that they are dressed differently now?

A Yes.

Q And let me ask you this, when you say you can't identify them, do you mean these aren't the men?

MR. BLUMENFELD: This is objected as leading.

THE COURT: We will overrule the objection and allow an exception.

MR. MEANS:

Q In other words, I want to get across what you mean when you say you can't identify them. Now, are you saying these aren't the men?

A If they would'nt be the men, why would that be they are in jail now.

MR. JOHNSON: Well, Your Honor—

[fol. 94] MR. BLUMENFELD: The whole thing is objectionable, Your Honor.

MR. TAMBURO: He is leading the witness, Your Honor, leading his own witness.

THE COURT: I think he has a right to explain by the use of the word, "identification," whether he is saying definitely that these men were not there or whether he is simply saying "I cannot say that they were there." Now, what do you mean about it, are you saying these

men positively were not there or are you just saying that you can't say they were or were not there?

A I identified the one as Chambers.

THE COURT: Please, listen to my question. By your saying that you cannot identify them as being there, are you saying they were not there or are you just simply saying you cannot say that they were there, that is, anyone of them were there?

A (No verbal response.)

[fol. 95] THE COURT: Well, all right, go ahead and ask him.

MR. MEANS: Let it go.

THE COURT: All right, that's all.

LEE HERMAN, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q What is your full name?

A Lee Herman.

Q Mr. Herman, you are a police officer employed by the Borough of Swissvale?

A That's right.

Q And were you on duty in the late evening and early morning of May 20, and 21, 1963?

A Yes, I was.

Q On that evening, were you alerted over your communication system, or did you receive information con-

[fol. 96] cerning a hold-up which occurred in North Braddock?

A Yes, I did.

Q How did you receive it?

A By radio.

Q Were you alerted to watch for a certain color and type of vehicle?

A Yes sir.

Q What was that?

A A light blue compact station wagon.

Q And did you see such a vehicle that evening?

A Yes.

Q When and where, what time?

A Well, on Monongahela Avenue, headed toward Rankin, I was coming away from Rankin, and the station wagon was headed down towards Rankin. It passed me on the street about a half block up from Church Street, the intersection of Monongahela Avenue and Church Street.

Q Were you in a Patrol car?

A Yes.

Q Another officer with you?

A No, I was by myself.

Q What did you do when you saw this station wagon pass?

A It went past me and there is a Kroger parking [fol. 97] lot right at that particular spot, and I turned into this Kroger Parking Lot to get turned around, and as I pulled in there, my partner, which was riding in the other patrol car, happened to be coming through there and he also, evidently, must have spotted this car, because he pulled right out behind as I was turning around. Whenever I got turned around, I pulled out behind him, and we followed this car down the street about a block or two, and he radioed me and—

Q By he, you mean the other officer?

A Yes, Officer Hagan, he asked me where I was, he didn't know I had also spotted this car, and I told him I was right behind him. He said, "well, I think this is the car we're looking for." When the description of the car came out, they said there was four occupants in the car, colored occupants, and he said, "I think this is the car, we are looking for, I am going to pull it over, I am going to get in front of it and pull it over." So, at this time, we were crossing a bridge going into Rankin. Officer Hagan put his dome light on, went around the car, and as he pulled in front of them, they turned right down a side street and I followed them down this side street. He went one street further and turned right and came back up toward them. They pulled just straight

down the street, it is only about a block long, and there [fol. 98] is a parking lot back there. They pulled the car straight into this parking lot. I pulled up behind them and then, he pulled down along side of them.

Q He had come in around the block?

A He came in around the block.

Q And this is what time in the morning?

A This was roughly between 12:30 and a quarter to one in the morning of May 21.

Q Now, you followed this car when it made the right turn, you pulled up behind it and the other officer came around the block?

A He came around the block and pulled up along side.

Q What did you see and what happened then?

A Well, as I pulled up behind the car, the men were getting out, two got out one side and two got out the other side, and they walked around the back of the car, which was facing my car, they were facing my car as they came around the back of it, and I got out of my car, opened the door and just stepped out of the door and told them to stay right where they were, and Officer Hagan, he pulled up, I could hear him radioing out station to have them contact Rankin and North Braddock and have them meet us down there.

Q Who was driving this car that you followed and pulled in behind?

A Well, I saw Mr. Lawson get out of the driver's side of the car.

Q Immediately after it stopped?

[fol. 99] A Yes.

Q Is Mr. Lawson in the Courtroom?

A Mr. Lawson is right here on this end.

MR. MEANS: Stand up, please.

A Yes, that's him, Mr. Lawson.

MR. MEANS: For the Record, the witness identified the defendant, Raymond Lawson.

MR. JOHNSON: Let the Record show that the witness identified Raymond Lawson for the purpose of stating he was driving the car.

MR. MEANS:

Q Who were the other occupants of this car, and where were they sitting, if you know, who got out of the front, and who got out of the back?

A Well, I am not positive just who got out of what seat, but the other occupants of the car was Mr. Chambers, Mr. Ramsey and Mr. Jackson.

Q Are they in the Courtroom?

A Yes, this is Mr. Jackson right next to Mr. Lawson, and Mr. Ramsey right next to him and Mr. Chambers at the far end.

[fol. 100] Q This is Mr. Jackson standing?

A Yes.

Q And Mr. Ramsey?

A Yes.

Q Was he in the car?

A Yes.

Q And Mr. Chambers?

A Yes.

Q He was in the automobile?

A Yes.

Q They got out of the car and you did what?

A We told them to stay where they were at, don't move away, and as they were standing in the back of the car, they was lined up, Mr. Lawson was to my left, Mr. Chambers was next to him, Mr. Ramsey was next to him, and Mr. Jackson was to my right.

Q Was there any conversation between you and them?

A Well, we told them to stay where they was, they stopped right away and they asked what was going on, and I told them that there was trouble in North Braddock and they wanted to have a talk with them, and that we called Officer Payne from Rankin to come over. About that time, Officer Payne was there.

Q What was this automobile that you followed, that they were riding in, describe it?

[fol. 101] A It was a light blue compact station wagon.

Q Do you know the year and make?

A I believe it was a '62 Pontiac.

Q Now, when you told them they were wanted in North Braddock for trouble there, did they say anything to that, did they ask you anything further?

A No, Officer Payne had come down and they started talking to him.

Q Now, what was the condition of these four men, anything abnormal or unusual about them?

A No, they looked perfectly normal to me.

Q Now, did the other police then arrive on the scene?

A Yes.

Q And did the other officers then take over the search of the defendants and the automobile?

A Well, at the arrival of Officer Payne, he asked me if they had been searched, I said, "No," and he said, "Well, let's search them." So, at that time, we searched them for weapons, and just as we got done searching them for weapons, while we was still searching them for weapons, the North Braddock Police arrived, and then, we turned it over to the Lieutenant from North Braddock, Lieutenant Wagner.

Q You made a search of the defendants' persons for weapons?

A Yes.

[fol. 102] Q Did you find any?

A No.

THE COURT: You say you were an officer in Woodville Borough?

A No, Swissvale.

THE COURT: Let's get the connection here. How far is Swissvale Borough away from North Braddock?

A It is the second Borough over. There is Swissvale and Rankin is right next to Swissvale, and North Braddock is on the other side of Rankin at this particular spot. Now, up the other end, up the other end of our town, North Braddock is right next to Swissvale Borough.

THE COURT: Well, then, North Braddock Borough adjoins Swissvale Borough, is that right?

A Yeah.

THE COURT: And did you go through Swissvale Borough, are you going towards Rankin?

[fol. 103] A At this particular spot, yes. Monongahela Avenue—as soon as you leave Swissvale, you are right into Rankin.

THE COURT: Well then, in effect, Swissvale Borough would be between North Braddock Borough and Rankin?

A No.

THE COURT: Why not?

A Rankin would be between Swissvale and North Braddock.

MR. MEANS: You may cross examine.

CROSS EXAMINATION

MR. JOHNSON:

Q Officer, I have just one question, were you present when any weapons or anything was found?

A No, I was not.

MR. JOHNSON: That's all.

MR. BLUMENFELD:

Q Officer, at the time that you came upon this car, they were actually heading in the direction of North [fol. 104] Braddock, is that correct?

A Yes.

Q Not away from it?

THE COURT: That's where I became confused, they were going toward Rankin, I thought you said.

MR. BLUMENFELD: Going towards Rankin and—

A Yes, they were heading toward Rankin, but to get to North Braddock from that particular spot, you have to go through Rankin.

MR. MEANS: May I—

THE COURT: Go ahead.

MR. MEANS: I was going to say,—point out that this is an hour after the robbery and it is not the Commonwealth's contention that at the time they were picked up—

MR. BLUMENFELD: I don't think Mr. Means should make any speech right now while we are cross examining.

[fol. 105] MR. BLUMENFELD:

Q Officer, I believe after Rankin and North Braddock and your police force had these men in custody, these men were divided up, is that right?

A Yes, they were.

Q Joe Jackson here was taken in your custody to Swissvale Police Station, is that right?

A Yes, he was.

Q And at that time, did you make a search of his person?

A At the station, Officer Hagan and myself and our desk Sergeant asked him to put everything from his pockets on the desk.

Q Isn't it a fact he had nine dollars and .35 cents on his person?

A Yes, he did.

MR. BLUMENFELD: That's all.

MR. LEBOVITZ:

Q Do you know the area in North Braddock where the Gulf Station is located?

A Yes, I do.

Q You are familiar with the location with respect to the parking lot where this automobile stopped?

A Yes.

Q How far would you say that this distance is?

[fol. 106] A Approximately a block.

Q I am talking about the parking lot in Rankin where the car stopped?

A Oh, that would be a couple miles.

Q About two miles?

A Yeah, around there.

MR. LEBOVITZ: That's all.

MR. MEANS:

Q You took Ramsey and Jackson?

A No, just Jackson.

Q I thought they kept two in one place and two in the other?

A I don't know, Officer Wagner is the one that asked me if I would take Mr. Jackson to our station, and we

took him to our station; I don't know how he divided the rest of them.

MR. TAMBURO: No questions.

HUGH HAGAN, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

[fol. 107] MR. MEANS:

Q Your full name?

A Hugh Hagan.

Q Mr. Hagan, you are a police officer employed by the Borough of Swissvale and you are the Officer Hagan that Officer Herman testified about?

A Yes sir.

Q You were in the Courtroom when he testified?

A The first time?

Q Now, just now, you heard his testimony?

A Yes.

Q You heard what he said?

A Yes.

Q Were I to ask the same questions, would you corroborate his testimony in substance?

A In the essential details, yes, there is one or two things that happened while I was getting in position, in other words, to pursue the other car.

Q Will you tell us about that?

A I called in for verification, I called the Station to find out if the car that I had under surveillance was the car that North Braddock was looking for, and when I got the okay from the Desk Sergeant than, I decided [fol. 108] with Lee Herman that we were going to pull them over and talk to them. You have to understand, we couldn't pull them over until they got into Rankin on account of the traffic problem. We have two street car tracks coming and going, cars parked on each side, to take a chance on pulling them over there may have endangered their lives and property, and I didn't want

to take that chance. Now, the bridge that we crossed is about, I'd say, about 100 feet. It connects Swissvale and Rankin. As I started to pass him, with the flashing red light on, they turned down Benwood Street. Then, there was headlights, I could see highlights in the rear view mirror, but I didn't know whether it was Car No. 2 or not, Lee Herman. I asked him, of course, he stated where his location was, he said he was right behind and, of course, he followed them on down Benwood Street, and I proceeded to Glass Street, which is the next stop sign, and I turned right and then, came back in Railroad Street where the parking lot is at. That's about all I have.

Q Those are the details?

A Yes.

MR. MEANS: You may cross examine.

MR. JOHNSON: No questions.

THE COURT: When you picked the car up first, [fol. 109] where were you?

A In the 1900 block of Monongahela Avenue heading towards Rankin.

JAMES PAYNE, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q Your full name?

A James Payne.

Q You are a Police Officer employed by the Borough of Rankin?

A That's correct, only I am a Lieutenant.

Q So, it is Lieutenant Payne?

A That's correct.

Q Lieutenant, did you come down to the scene of this arrest as testified to by Officer Herman?

A Yes, I did.

Q And what did you find when you got there?

A I found four men standing outside of the station wagon, two police officers standing beside their cars.
[fol. 110] Q Did you participate in talking to or searching any of these defendants?
A Yes, I did. I asked the officers from Swissvale had they searched the young men and they said, no. I said, "Well, let's search them for weapons." So, we proceeded and searched the four men for weapons.
Q You found no weapons?
A I searched two and the Swissvale police searched two.
Q None of you found any weapons?
A I found no weapons on either two.
Q And did you examine the car at all at that time?
A Two police officers, one from Swissvale and myself, took our searchlights and shined them through the window, that's all.
Q And this is about the extent of your part in this, was it?
A All but taking Ramsey to out Police Station.
Q You took Ramsey; when you got Ramsey to your police station, did you search him?
A No, I did not.
Q Did you interrogate Ramsey?
A I did not, only on the ground.
Q At the scene?
A That's right.
Q What was your interrogation of Ramsey?
[fol. 111] A I said to Ramsey, he asked me, "Mr. Payne, what's the trouble," and I said, "Well, I don't know, something happened up in North Braddock," but I said, "Ramsey, I hope that you're not in this; if you are, you are in bad trouble," but, I said, "we have to hold you."
Q What did Ramsey say to that, if anything?
A I asked where he had been and he told me, Wilkinsburg. I said, "Had you been in North Braddock," and he told me, no.
Q He told you he hadn't been in North Braddock?
A That's correct.

THE COURT: Did you know Ramsey, I take it you did?

A I knew all of them.

MR. MEANS: You may cross examine.

MR. JOHNSON: Nothing.

MR. BLUMENFELD: Nothing.

MR. LEBOVITZ:

Q I believe that you said that you didn't search Ramsey?

A Yes, I did, on the ground.

Q Did you search his person to determine if he had [fol. 112] any money on him?

A No, I did not.

Q You didn't do that?

A No.

Q I believe he was later taken to the Rankin Police Station?

A I had taken him to the Rankin Police Station.

Q And you said that at the Police Station you didn't search him?

A I did not.

Q Was Ramsey searched while he was—by any other officer while at the Rankin Police Station?

A Not at the Police Station in Rankin.

Q How long was he in the Rankin Police Station?

A I couldn't give you the time, because I was busy otherwise and he had stayed there until North Braddock picked him up.

Q Do you recall what time it was when you drove over to the parking lot where the station wagon was parked?

A Well, it was in around in that vicinity.

Q What time?

A 12:45 A.M.

Q And then, Ramsey was taken to the Rankin Police Station?

A That's correct.

Q And he was kept there, is that right?

A Kept there, until North Braddock Police picked him up.

[fol. 113] Q Do you know what time that was?
A No, I don't.
Q You were there when they came?
A No, I was out on another call.
Q Lieutenant Payne, this Benwood Street, it turns right off Miller Street in Rankin, isn't that right?
A The first street to the right, coming in from Swissvale.
Q What is the second street, the next?
A Gas Street.
Q Officer Hagan said Glass, is that the same street?
A He turned down Gas Street.
Q He said he turned down Glass Street?
A He meant to say Gas.
Q That's the same street?
A Yes sir.
Q What kind of a street is Benwood?
A A short street, not leading very far from the carline to the Parking Lot.
Q Is that where it leads to, to a parking lot?
A Yes.
Q Is this a dead end street at that point?
A To the right, yes; to the left, no. You can go out to the left and go out to Gas Street.
[fol. 114] Q Well, if you went through the parking lot and you reached Gas Street, what would you do at Gas Street?
A You turned left and hit the carline again on Miller Street.
Q You'd be back on Miller Street?
A Yes.
Q Would you classify either Benwood or Gas as being main thoroughfare streets?
A No.
Q They are side streets?
A Yes.
Q Benwood Street ends one block below Miller Street?
A Benwood ends a half block below Miller Street.
MR. LEBOVITZ: That's all.
MR. TAMBURO: Nothing.

THE COURT: Excuse the Jury until 1:15.

(Court recessed at 12:05 P.M.)

(Court reconvened at 1:25 P.M.)

THE COURT: All right, Mr. Means,—

[fol. 115] MR. MEANS: Your Honor, there are two attorneys missing.

MR. BLUMENFELD: Your Honor, until Mr. Lebovitz arrives, I will protect his client's interest.

MR. TAMBURO: Your Honor, may I have a side bar conference on a matter.

THE COURT: All right.

(At side bar.)

MR. TAMBURO: Your Honor, at the first trial, the District Attorney attempted to introduce into evidence some .38 calibre bullets that were found at the Chambers' home after his arrest. His home was searched, they found .38 calibre bullets At that trial, it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the Jury to hear it. I don't feel there is any relevancy or connection between

[fol. 116] the fact there were .38 calibre bullets at his home and the fact that a .38 calibre gun was found, not on the person of chambers, but in the group. I would like to object to the bullets being entered into evidence or being brought up at this trial.

MR. MEANS: There is a little more to the proof than just that, a little more details than that. We can show that these guns are both .38 calibre, one is a long and one is a short, and they take long shells and short shells, and that both type of shells, which could be used in either one of these guns, were found in the home of this defendant, which is a circumstance indicating—

THE COURT: Whose home?

MR. TAMBURO: Chambers, that's my client.

THE COURT: Chambers, who was the one identified by the first witness Havicon?

MR. MEANS: He was also identified by Kova-
[fol. 117] cich the next day, but he said he can't identify him now.

THE COURT: He said .38 caliber gun—you haven't introduced anything about that as yet.

MR. MEANS: I have to first show where they were found, we are getting to that now, they were found in the car with the men. What he is objecting to is, after they found the gun, they searched Chambers' home and found shells for both types of guns, and we would say that this evidence that he owned one or both of the guns.

MR. TAMBURO: I don't feel that that ties in at all, it is a common type of gun to have. I just think that without more than that, it is unfair to put that in against my client along with everything else that they have been putting in.

THE COURT: Was Wagner going to testify as to finding the guns in the car?

MR. MEANS: Yes.

[fol. 118] MR. TAMBURO: But, not on the person of any one individual.

THE COURT: You already have by Havicon that he saw Chambers with a .38 caliber revolver.

MR. TAMBURO: You still don't see the fact that they found the bullets at his home in any way in the case has anything to do with the gun.

MR. MEANS: Just cummulative, along with the other evidence, and without the other evidence, it might be admissible, but when you already have the other evidence, he was seen with this gun or a gun resembling it, and where the gun was found in the car, where he is, which we will put in, I think it is not too far off to now show that he had in his possession, in his home, shells which would fit both of these guns.

THE COURT: I want to think about it for a while until we come to that, then you interpose—I
[fol. 119] will consider the objection being made there when he comes to the search.

MR. TAMBURO: Of course, at that point, he will have already brought it up that the bullets were found.

THE COURT: No, he is going to tell us what they found at the time of the arrest in this particular car, which would not include the bullets.

MR. MEANS: The Bullets were found by another officer than the one who will testify now.

(End side bar.)

THEODORE W. WAGNER, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q Your full name?

[fol. 120] A Theodore W. Wagner.

Q You are a police officer employed by the Borough of North Braddock and hold the rank of Lieutenant?

A Yes sir.

Q On the evening of May 20, 1963, were you detailed to investigate a robbery which occurred at the Gulf Gasoline Station at the corner of Sixth Avenue and Baldridge Street in North Braddock?

A Yes, I was.

Q What did you do first after you were assigned to this case?

A We received the call at 11:52 P.M. on May 20 to go to the Gulf Station at the corner of Sixth and Baldridge Avenue, we arrived at the scene within a couple of minutes and talked to Stephen Kovocich, which he was the attendant at the time, and he explained to us about the hold-up there and he give us a description of the two fellows that was in the office.

THE COURT: Wait a minute, here, you say he was the attendant?

A Yes, Stephen Kovocich.

MR. MEANS:

Q Then, did you also see and talk to the witnesses here, Linda Oschinick and Jerry Klaus?

[fol. 121] A Yes, we did.

Q From them you got a description of this automobile?

A Yes, it was.

Q And when you got the description, did you relay this to other police stations in this area?

A Yes, it was given out right away, the description of the car.

Q Was this by radio?

A Yes, and by phone.

Q And then, did you later receive information from some other police department about this arrest that occurred down in Rankin?

A Yes, we were informed they had apprehended a car similar to the one we were looking for.

Q Did you go to Rankin?

A Yes, I did.

Q When you arrived there, were these other officers, Swissvale and Rankin there?

A Yes, they were.

Q What did you do then when you got there?

A When we arrived at the scene, we had talked to Lieutenant Payne and the officers from Swissvale, and they had searched the fellows for any weapons, and we checked them over, and with the description that we had [fol. 122] from North Braddock there on this hold-up, there was a trench-coat involved and also a green sweater involved on one of the boys, which was a description that was given to us.

Q When you arrived, who was wearing the trench-coat or who had the trench-coat and who had the green sweater?

A Chambers is the one that had the green sweater on at the time. The trench-coat was laying on the seat of the car, as far as I know, of course, I can't say exactly which one—

Q Did you see a trench coat of the type described to you by Kovacich?

A Yes.

Q Where was it?

A On the seat of the car.

Q None of the defendants were wearing such a coat at the time you arrived?

A No, not when I arrived.

Q Chambers was wearing a green sweater and what type of sweater was it, what other description can you give us other than green?

A Green and pull over sweater with kind of a V-shape in front.

Q What color was the trench coat?

A It was a light-colored trench coat.

Q Were any of the defendants wearing hats?

A Not that I took notice.

[fol. 123] Q Any hats in the car?

A Yes, there was.

Q How many and describe them.

A Well, there was a couple different hats in the car, just regular felt hats which nobody claimed that belonged to them.

Q Now, at the time you arrived, was Chambers wearing glasses?

A Well, I'm not too sure about that when I arrived at the scene whether he had glasses on.

Q Have you ever seen him with glasses on before except in these Courtrooms?

A He had a pair of sun glasses on that night when we brought him in.

Q Was he wearing them?

A Yes, he had them on.

Q At the time you arrived in Rankin?

A No, whenever we brought him into the station there, he had a pair of sun glasses on.

Q When you arrived?

A No, I didn't take notice to sun glasses then.

Q Now, did you search these men for anything other than weapons and if so, when and where?

A When we arrived in Rankin, they were already searched for weapons. When we brought them back to [fol. 124] our Station, well, then, they were gone over again there. I brought two of them back.

Q Who did you bring back?

A I brought back—I rode back with Mr. Lawson in his station wagon.

Q Who drove the station wagon?

A Mr. Lawson.

Q Did you ride back with him?

A Yes, I did.

Q What was his demeanor and condition at the time you saw him there and rode back to the station with him?

A Good.

Q Did you interrogate him on the way back about this robbery at all?

A No, I didn't say anything to him on the way back about the robbery.

Q Did he say anything to you?

A No, he didn't.

Q And he drove you back to North Braddock Police Station?

A Yes.

Q In his station wagon?

A Yes.

Q Did you ascertain the ownership of this light blue station wagon?

[fol. 125] A Yes, the car belonged to him.

Q After you got back to the police station, did you search Mr. Lawson?

A Yes, we did.

Q What did you find?

A Well, he had some money on him and it was turned over to our Sergeant.

Q Well, what money was on him?

A What money was on him, Lawson had a total of $46.00.

Q Did you make a note of the denominations?

A Yes, it was turned over to the Sergeant.

Q I asked you if you made a note of the denominations of the money that Lawson had?

A Yes, we did.

Q What did he have?

A Lawson had eleven one-dollar bills, three fives, and two tens.

Q Who else was taken out to North Braddock?

A Chambers.

Q Did you make a search of Mr. Chambers?

A Yes, we did.

Q What did you find on him?

A Chambers had nine one-dollar bills.

Q What else?

[fol. 126] A One two-dollar bill, one ten dollar bill, and two fives.

MR. JOHNSON: Would you repeat that, Officer?

A Nine ones, one two, one ten, and two fives.

MR. MEANS:

Q Lawson had what, again?

A Eleven ones.

Q What else?

A Three fives, two tens.

Q Now, did you interrogate Lawson and Chambers and ask them whether they knew anything about this robbery?

A Well, whenever we first brought them in, it was mentioned to them and we didn't get no answer from nobody, they didn't say anything about any robbery or anything concerning any, they wasn't in North Braddock.

THE COURT: What?

A They said they weren't in North Braddock—they weren't any where around, that's about all they had to say.

THE COURT: They denied participating in it?

A Yes.

[fol. 127] Q Both of them did?

A Yes sir.

Q Did I understand you to say they were not in North Braddock at all?

A That was more or less mentioned.

Q And then, we have heard that the other two defendants, one was taken to Rankin Police Station and one to Swissvale?

A Yes.

Q Were they eventually brought over to North Braddock?

A Yes, they were.

Q When was this?

A The following morning, they were brought back.

THE COURT: You mean the same morning or the next day?

A No, the same morning.

THE COURT: That would be the 21st of May?

A Yes.

MR. MEANS:

Q Was an interrogation made that you participated in of Mr. Ramsey and Mr. Jackson?

[fol. 128] A No, I didn't, the Chief interrogated them.

Q You weren't present at that time?

A No.

Q Now, Officer,—did you search this automobile at any time, and, if so, when?

A When we brought it in, we put it in the police drive way, that is, Lawson drove it into the police drive way and we parked it there and we took them on in to the station, and we went back out and we went through the station wagon—

Q Who is we?

A Officer Cassidy and myself.

Q What did you search in, in this car?

A Well, we went through everything, under the seats, and through the back of the station wagon, there was a lot of tools in boxes, and we went through them things there, which was fairly dark there, we used flashlights, and look around, and we went back in the station, and we didn't come across anything the first time out. We went in, I talked to them, I asked them about if they were around the vicinity again, or this, and that; in the meantime, we went back out again, and Officer Cassidy was searching the car, and somehow or other, he opened a little vent on the heater, some kind of air duct.

Q Where is this vent located?

[fol. 129] A On the passenger side of the station wagon underneath the dashboard, and he opened some kind of a little vent there and that's where two revolvers were.

Q I show you Commonwealth Exhibit 1, and 3, being the revolver that have already been testified to, were these the revolvers found down in this vent?

A Yes, they were.

MR. MEANS: We will offer Exhibits 1, being the .38 nickel-plated revolver, and Exhibit 3, being the .38 dark blue revolver, in evidence at this time.

THE COURT: All right.

MR. MEANS:

Q What else was found, Officer?

A There was a glove that was found full of change.

Q I show you Commonwealth Exhibit 4, a glove full of change, is this the glove you referred to?

A This is the glove.

MR. MEANS: We will offer exhibit 4 in evidence.

THE COURT: Where did you find that?

[fol. 130] A That was all with the guns up in this air duct.

THE COURT: IN the air duct?

A Right underneath the dashboard of the car.

THE COURT: All right.

MR. MEANS:

Q Was the glove full of this change that is in it now?

A Yes, it was.

Q Has the amount of that change been counted?

A Yes, it was.

Q Did you make a note of the amount?

A Yes, I have $34.79, the Sergeant made a report on it.

Q Now, this gum band that I have around the top of the glove, it's been testified that was not on the glove at the time you found it?

A No.

Q Did you find anything else in the vent?

A There was some driver's licenses and owner's cards that came out of there, too.

Q I show you what is marked as Commonwealth Exhibit 2, being four cards, one operator's license—two operators' licenses, one for 1961-62, and the other one [fol. 131] for '63-64, and a membership in some society in Turtle Creek and another card, an application for change of address to the Commonwealth of Pennsylvania, all bearing the name of Raymond Havicon; are these the cards you referred to?

A Yes, they were.

Q They were found in the vent along with the two guns and the gloves?

A Yes.

MR. MEANS: At this time, we will offer exhibit 2 into evidence, the cards belonging to Mr. Havicon.

THE COURT: All right.

MR. MEANS:

Q Now, Officer, did you confiscate the money you found on Chambers and Lawson?

A Yes, we did.

Q And has this been in the possession of Chief Cicco here since that time?

A Yes, it was.

Q And I show this two-dollar bill, this was found on the person as I understand, of Chambers?

[fol. 132] A Yes.

Q Where did they carry this, by the way?

A It was in their pocket.

Q In a wallet?

A No, I didn't see no wallet.

Q It was loose?

A Yes, loose.

Q Did you give them a receipt for this money?

A Yes, I did.

Q Did you write it out?

A No, the Sergeant took all that.

Q And you keep a carbon copy of the receipt given?

A Yes.

Q And I will show you a page from the receipt book at your police station, is this the carbon copies of the receipts given for this money?

A Yes, that's the one.

Q It shows that Lawson had $31.00 and Chambers had $46.00?

A Yeah, then I got a mistake there.

Q You have a mistake?

A Yeah, I have it marked the other way. In other words, it is just the reverse than what it is there, probably whenever I took it down, I took it down at random.

[fol. 133] Q Are you saying then that the $46.00 may have come from Mr. Lawson instead of Chambers?

A That's the official receipt there that the Sergeant took.

Q Let me ask you this, aside from how much money came from either one, when you testified that the two-dollar bill was on Chambers, are you positive of that?

A Yes.

Q Now, when you found these things in the automobile, did you then discuss them with Mr. Lawson as to why these things were in his car?

A We took the guns and the glove and everything right into the station and put them on the desk there, we told him it was found in his station-wagon.

Q Was Lawson there?

A Yes.

Q Who else was there?

A Chambers.

Q You told Lawson it was found in his station wagon?

A Yes.

Q What did he say?

A Nothing.

Q Refused to make any comment?

A That's right, there was nothing said.

[fol. 134] THE COURT: Now, you just tell us, Officer, what you said to them, let's find out what did take place.

A We explained it—

THE COURT: What did you—as near as you can recall, what did say to them?

A That we had gone and checked through their station wagon.

THE COURT: Well, the station wagon belonged to Lawson?

A Yes.

THE COURT: Now, go ahead.

A And that we had gone to the station wagon and this here bag, this glove of money was found in the station wagon along with the gun and also the cards belonging to Havicon, and I asked them if they had anything to say, and there was nobody said nothing.

THE COURT: Is that the way you said it?

A Have you got anything to say about this, I asked [fol. 135] them if they had anything to say about what we found in their station wagon, and nobody said nothing.

THE COURT: I am particularly interested in knowing what they said, the two defendants.

A They didn't say anything.

THE COURT: They didn't say a word?

A No, didn't say nothing back.

MR. MEANS:

Q Both Lawson and Chambers were present when you showed them these exhibits—

A Yes, they were brought right in there.

Q Neither said a word?

A No.

Q Well, just for the record, when I use the names Lawson and Chambers and Jackson and Ramsey, those are the defendants that are here in Court?

A Yes.

Q Officer, is there any difference noticeable to you in the appearance of any of these defendants now as compared to them at the time you arrested them on the 21st of May?

[fol. 136] A Well, quite a bit of difference. They weren't dressed like that then.

Q I can't hear you?

A They weren't dressed like that.

MR. BLUMENFELD: Could I ask that these questions be made specific as to each defendant, rather than generally.

THE COURT: Yes.

MR. MEANS:

Q You tell us, when you say they weren't dressed like that, you mean all of them?

A Well, the night we went over to Rankin, they were more or less in working clothes, and Mr. Chambers, he does look a little different, there, as far as that goes with the hair and also the mustache and,—

THE COURT: I didn't quite get that, what's that?

A Chambers does look a little different than the night we apprehended him. He was in a green sweater, and his hair was a little bit longer and he had a larger mus-
[fol. 137] tache than what he has now.

THE COURT: He had a larger mustache on him when you arrested him?

A Yes.

MR. MEANS:

Q What about the others?

A Well, the other boys look more or less the same way, but the clothes, I mean, they had different clothes on, more or less working clothes.

Q Now, were you present when Mr. Kovacich was called to identify these men?

A The following day, I wasn't.

Q That was handled by another officer?

A By the Chief.

MR. MEANS: You may cross examine.

CROSS EXAMINATION

MR. JOHNSON:

Q Lieutenant Wagner, you testified a few minutes ago that Mr. Lawson had $46.00, composed of eleven ones, three fives and two tens, is that correct?

[fol. 138] A That paper there is the official receipt right there, that's the one the desk sergeant took, right there, that's our official report, that's what was taken off them.

Q So, your testimony was mistaken that he had $46.00?

A One of them had $46.00 and the other one had $31.00.

Q Now, you testified that Chambers had one two, one ten, and two fives and nine ones, that totals $31.00, correct, and the other denominations were eleven ones, three fives, two tens, and that totals $46.00, right?

A Right.

Q So that this carbon copy, which is a receipt of money taken from Raymond Lawson, shows him having turned over to the police department $31.00, this would be correct?

A That is the official paper there that was taken.

Q Frank Chambers had $46.00?

A Right.

Q So, you just had them turned around?

A Very possible.

Q Well, you did or you didn't?

A Yes.

Q Therefore, Lawson had $31.00 and Chambers had $46.00; now, Mr. Means asked you if Chambers had the two dollar bill, and you said yes; you mean Lawson had [fol. 139] the two dollar bill, don't you?

A That's right.

Q Lawson?

A Yes.

Q The two dollar bill went with the $31.00?

A That's right.

Q In other words, you had the right denominations but the wrong people?

A That's right.

Q Now, at the prior trial of this case, Lieutenant, weren't you asked on Cross Examination if you had any record of the denominations, and you said you did not.

A That's right, I told you the Desk Sergeant had a listing of what was taken.

Q So that when the case was tried before, you didn't have the listing of the denominations then?

A No.

Q But, you have gone since and asked him what they were?

A I went to our Official Papers there and took them off, figuring that's what you wanted to know.

Q You didn't actually receive this, did you?

A Receive what?

Q The money?

[fol. 140] A I was present right there.

Q You didn't give the receipt?

A No, the Desk Sergeant wrote it.

Q You didn't make a note of it, did you?

A Well, I had a note of it right there at the time.

Q Why, when he asked you before if you could identify the money by denominations, you said you couldn't?

A I didn't have it listed down on my own paper.

Q You didn't have it with you that day?

A That's right.

Q You since have ascertained what they were?

A Yes.

Q Mr. Means asked you—I forget whether he asked you if this was the two-dollar bill or not, I don't remember what the question was, I show you this money and ask you if you know whether that was the money taken from these men, I'm talking about the specific money that was taken from them; is this the exact money?

A Yes.

Q Are you sure of that?

A Positively sure.

Q Now, you testified on Direct Examination, Lieutenant, that this search of the defendant's car took place [fol. 141] outside the North Braddock Police Station, is that correct?

A Yes.

Q And that you and Officer Cassidy searched the car and that you found these two weapons, the glove with the money and these assorted cards inserted in the ventilator or the heating ventilator, right?

A More or less, that's what it is.

Q You didn't find them, yourself, did you, did you see them removed from there?

A Yes, I did.

Q Were you the one who found them or did Cassidy find them?

A Officer Cassidy opened the vent door of that heater, the blower, and I was standing right beside him, and he said, "Look at this here," and that's what it was.

Q Had he already taken it out?

A No.

Q It was all in there?

A All right there.

Q What is the size of that ventilator?

A Well, it is roughly some kind of a blower or cold air or something there, there was room enough in there to put something in there, that's exactly where it was, it has some kind of a little catch on there, turn the catch [fol. 142] and that door came open, and that was it.

Q What size would you describe it?

A That, I couldn't exactly tell you the size of the vent,—.

Q These items, you could see them with the door open?

A Yes, and whenever you opened it up, there was a card, which I think, fell out there, and the bag more or less slid a little bit there, that's when he called my attention to it. I was right there when he showed it to me before he took anything out.

Q Now, none of the defendants were present when you made this search?

A No, they weren't.

Q None at all?

A No.

Q They were inside the police station?

A Yes.

Q I believe, Officer, you testified before that the car had been searched when it was first found down in Rankin?

MR. MEANS: When?

Q When the Officer from Swissvale and Lieutenant Payne drove up, you didn't conduct the search down there?

A Not the car, we didn't.

[fol. 143] Q But, you were there?

A Oh, yes, I was at Rankin.

Q You didn't look in the car at all?

A No, Lieutenant Payne—they more or less shined the light through it, and whenever I got in the station wagon with Mr. Lawson to come back to my station, I looked around before he got in the car to see if there was anything laying around on the seat or on the floor, we didn't search the station wagon there.

Q You say the fellows had this money in their pocket, this currency, did they have any change?

A Yes, one of them had a little bit of change.

Q Who was that?

A I'm not too sure which one, because he had a little bit of change and he said he wanted to get some cigarettes, I told him to keep the change and we'd give him the receipt for the money.

Q Were you present when Mr. Kovacich testified in the prior proceeding?

MR. MEANS: Objection, if he is going to impeach Kovacich's testimony, that is not the proper way to do it.

THE COURT: Yes, I assume you are going to refer [fol. 144] to testimony of the attendant there at the Gulf Station. If you want to call this witness on your side of the case to disprove anything which he said, it is proper to do so.

MR. JOHNSON: I will withdraw the question.

MR. JOHNSON:

Q When you first arrived at the scene of the robbery and talked to Mr. Kovacich, how much money did he tell you was missing, if any?

A He didn't tell me any amount of money, he just said he was robbed.

Q Did you make an investigation to find the amount of money that had been taken?

A Not right at the time, no.

Q Did you subsequently?

A Yes, we did.

Q And this was prior to the original hearing in this case?

A We arrived at the scene—

Q Please answer?

A What was the question?

Q Did you make this investigation regarding the [fol. 145] amount of money that was taken prior to the time this case was first tried?

A Yes.

Q What was the result of that investigation?

A Well, when we talked to the owner, he give us an estimate on it.

Q What was that amount?

A Well, he said around about two hundred dollars.

Q Around about $200.00?

A Yes, and he wasn't too sure.

Q How did he base his estimate, if you know?

A Well, this was all within a hour or two hours after when this all happened. We had called him or we had notified the attendant there to contact the owner of the station, and he arrived at the scene and more or less relieved this attendant, and the attendant did come up to the station, and by the time we came back to the station, he give us a rough estimate just about what was stolen.

MR. MEANS: Who is "he?" Officer?

A His name is Marvelli.

MR. MEANS: You are still talking about the owner?

[fol. 146] A Yes.

MR. JOHNSON:

Q If I asked you the question, wasn't the amount of money or the amount of shortage that he originally thought that he had lost $211 and some cents, you think that might be correct?

A He quoted us a couple hundred dollars, and he said it would take time to more or less check it out.

Q Do you know how he based his estimate?

A No.

Q He didn't tell you that it had been based on the tape or cash register tape?

A No, we didn't go into that.

Q You don't know, of your own knowledge, Officer, that this money here—you don't know of your own knowledge that this money was taken from the Gulf Service Station, do you?

A No.

Q You don't know where it came from, other than the fact that Mr. Lawson and Mr. Chambers had thirty-one dollars and forty-six dollars respectively on them, isn't that correct?

A That's right.

Q Did you count that change?

A No.

[fol. 147] Q The Sergeant did?

A Yes.

Q Did he do it that night?

A Yes, he did.

Q Were you present the next day when Mr. Kovacich came in and identified Mr. Chambers as having been one of the men who committed this robbery?

A No.

Q Do you know who was present—who conducted this?

A Yes, the Chief conducted this.

Q Now, you testified that when you asked Mr. Lawson about whether or not he had anything to do with this,—or, perhaps, I am not stating it exactly as you told it, but some words to that effect—he just didn't say anything, he didnt' deny it, didn't affirm it?

A No, he didn't talk to me.

THE COURT: Let's get clear on that, Officer, I think you did state, or did you not, that when they both said—these two men were taken there, that they said they weren't around North Braddock?

A Well, he mentioned that in there, not directly to me.

[fol. 148] THE COURT: Were you present?

A Whenever I was present and asked them about this here?

THE COURT: Wait a minute, we are talking about two different things here. First, when you talked to them

first about whether they were implicated in this, they said they weren't around North Braddock?

A That's right.

THE COURT: Now, the question is, what they said when you confronted them with these articles, you say you took out of the car, the revolvers and the cards and the change in the glove.

A There was no answer.

THE COURT: They made no answer to that?

A No answer.

THE COURT: These are two different things we are talking about.

A No answer made.

[fol. 149] MR. JOHNSON:

Q But he did deny prior to that that he had been involved?

A Being involved in it?

Q Yes.

A Nobody said they was involved in it.

THE COURT: Didn't you say they told you, when you asked them about it, that they had not been in North Braddock?

A That's right, it was mentioned they weren't in North Braddock.

THE COURT: I would take it to be a denial there.

MR. JOHNSON:

Q In other words, just to get the record straight, on the way back to the police station, the defendant Lawson denied that he had been in North Braddock, correct?

A Yep.

Q As the Judge said, this would indicate that he was denying that he had any part in it, right?

A Well, he wasn't accused of it, he wasn't accused of that robbery.

Q Well, let's go into that. Did you tell him why you were taking him back to the police station?

[fol. 150] A No, we told him we were taking him back to North Braddock, that's all that was mentioned to him then.

Q By you?

A Yes, by me.

Q Then, what would prompt him to say he hadn't ever been in North Braddock?

A I asked him if he had been in North Braddock within the last hour, and that was—I think other officers over in Rankin asked him, mentioned the same thing to them, that North Braddock wanted them in regard to questioning. So, whenever he came—when we came to the station there, well, he didn't say anything there, and we brought the guns in and the glove and the money, and he didn't say anything then, when he seen this.

Q He said he hadn't been there in the past hour?

A That's right.

MR. JOHNSON: That's all.

MR. BLUMENFELD:

Q Lieutenant, just so we get this all straight. We kind of went through this the last time, too. Sometime along the line, you asked Lawson or Chambers, "did you or did you not hold up the gas station?"

[fol. 151] A Yes.

Q They denied it, didn't they?

A Yes, that was it.

Q Let me show you this map the Chief made, so the Jury may get a better picture of this, will you step down a minute,—Lieutenant. Lieutenant, would you take a look at that, this is Sixth Street, so you get an idea, if that's an accurate portrayal of the general vicinity where this happened?

A Yes, that's good.

THE COURT: What is your answer?

A Yes.

MR. JOHNSON: He said it was a good drawing.

MR. BLUMENFELD: This is Sixth Street and this would be leading toward Braddock?

A Yes.

Q Here on the corner is Baldridge Street intersecting with Sixth Street?

A Yes.

Q This is the Gulf Station we are talking about that was robbed?

A Yes.

[fol. 152] Q That's open all night, right?

A Yes.

Q On this corner right here is the Esso Station?

A Yes.

Q That's open all night?

A No..

Q It isn't?

A No.

Q How late are they open?

A Twelve o'clock.

Q They still would have been open at the time the Gulf Station was robbed?

A They were open.

Q This house right over here, a little bit down the street, that intersection, would be the house where Linda lives?

A Yes.

Q Here is the Kroger Parking lot we have been talking about, right?

A Yes.

Q With an exit here leading to Sixth Street?

A Yes.

Q With an exit here leading to Baldridge Avenue, correct?

A Yes.

[fol. 153] Q Now, in between this Esso Station and this exit leading to Sixth Street, there is a tavern, a garage and another building?

A Yes.

Q Here between the Esso Station and this exit leading toward Baldridge Avenue is a social club, is that right?

A Yes.

Q So that, am I correct in stating that anyone parked within the parking area of the Kroger's parking lot could not see to the Gulf Station, is that correct?

A That's right.

Q And, as Linda described, she and Jerry walked through that parking lot at the spot they identified the car as being at that particular time, the occupants of

that car could not have seen the Gulf Station as she described it, as that so?

A That's so.

Q So that, actually, the only way that somebody in this Kroger parking area could see this Gulf Station would be at this exit here, near Baldridge Avenue, is that correct?

A That's right.

MR. BLUMENFELD: That's all.

MR. LEBOVITZ:

Q Lieutenant Wagner, I just want to ask you a cou- [fol. 154] ple questions. After Ramsey was left at the Rankin Police Station, did you see him later that morning?

A Yes, I did.

Q Did you go back and search him?

A Yes, I did.

Q Will you tell the Court and Jury what the search consisted of?

A We went back over to Rankin and asked the Desk Sergeant if he had gone through his pockets and that, and if there was anything on him. As far as anything on him, they said he didn't have nothing on him, and he took us back to the cell and we conducted a thorough search of him and we didn't find anything.

Q You conducted a thorough search of Ramsey in the Rankin Police Station and you couldn't find anything on him, is that correct?

A Yes, sir.

Q By that, do you mean you didn't find any money on him?

A No, we didn't.

MR. LEBOVITZ: That's all.

MR. TAMBURO:

Q Officer, I don't want to belabor this point, but I have to ask you, now, one more time about the amount of money, because you said it one way, then you said it another way, then, you changed back again. For instance, [fol. 155] you were mistaken and admitted so when you said Chambers had $31.00; in fact, he had $46.00?

A Yes, according to that.

Q You really don't remember, you are just basing it on the receipts that you have here?

A Yes.

Q You personally don't remember at all?

A No.

Q Although you did testify on Direct Examination under oath as if you did remember that he had $31.00, but now you admit you really don't remember?

A Well, no, it is on the receipt.

Q But, of your own knowledge, you don't remember, do you?

A Not exactly.

Q The only thing that bothers me, after you finally admitted you made a mistake when you saw the receipt today, then, said, Chambers had $46.00 and Lawson had $31.00, and you said that's right, but you still insisted that Chambers, the last man here, had the two-dollar bill, you still continue to insist, though you realized you made a mistake, that he had the two-dollar bill?

THE COURT: Wait a minute, he corrected that later.

[fol. 156] MR. TAMBURO:

Q Then, later, you said he didn't have the two dollar bill?

A Yes sir.

Q Now, are you saying the man who had the two-dollar bill was not Chambers?

A Was not Chambers, that's right.

Q But was Lawson?

A That's right.

Q Are you sure of that?

A Yes.

Q And you are absolutely positive when you asked these men about the robbery in the jail and showed them this glove and the guns, that they didn't say anything?

A Nope.

Q Do you remember that positively?

A That's right.

Q Although you are somewhat mixed up on this money bit, you do remember the fact that they said nothing?

A They didn't talk to me at all about it.
Q Previously, they did deny the robbery?
A They didn't deny it, they didn't say nothing.
Q I'm sorry, I understood you now told Attorney Blumenfeld that they did deny the robbery?
[fol. 157] A They said they wasn't in North Braddock, that was more or less denying the robbery.
Q We are in a Court of Law, I want to know specifically if you know what they said?
THE COURT: Please don't argue with the witness. Perhaps, I am at fault here when I suggested that the denial that they were in North Braddock would mean a denial of participating in the robbery; I didn't understand it, then, as I do now, these people had not been accused at that time of having committed any robbery, is that correct?
A That's right.
MR. TAMBURO: Well, in my notes I have been taking, pretty thorough notes on Direct Examination, my notes indicate that you asked them if they had been in North Braddock, and taken part in the robbery, and they denied they had been in the North Braddock and taken part in a robbery.
[fol. 158] A In Rankin, they denied being in North Braddock.
Q Now, you say you didn't ask them about taking part in a robbery?
A Whenever we brought the gun in, the glove and the money, they didn't say nothing.
Q But, before you even found the guns, didn't you ask them about a robbery?
A No, I asked them whenever we brought the guns and that in there, that's when it was brought up to them.
Q Now, you stated that the men looked somewhat different today in Court?
A Yes.
Q Do you have any trouble recognizing Chambers?
A Well, I only seen him one time.
Q You know who he is, Officer?
A Yes.
Q Which one is he?

A The one with the glasses.
Q Back here?
A That's right.
MR. TAMBURO: That's all.

[fol. 159] CHARLES CASSIDY, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q Your full name?
A Charles Cassidy.
Q You are a police officer employed by the Borough of North Braddock?
A Yes sir, I am.
Q You are the Officer Cassidy that Lieutenant Wagner was talking about, are you?
A Yes.
Q Mr. Cassidy, did you and Lieutenant Wagner search this car?
A Yes, we did.
Q Is this, as testified, outside the police station in North Braddock?
A Pardon me?
Q Was this at the police Station in North Braddock?
A Yes, it was.
Q Exactly what time was the search made?
A Well, we searched the car after we brought them [fol. 160] back from Rankin the first time, because it had a lot of tools and stuff in the back. So, we didn't find nothing at the present. So, we went back out after we went back in the station and talked to them a little bit; so, we went back out and were proceeding to search the car. I find this vent and opened this ventilator underneath the dash. I opened that trap-door like and that's where I seen the two revolvers and money bag and these cards.

Q Do you have to bend over to get at this vent?
A Oh, yes.
Q Down underneath the dash?
A Yes.
MR. MEANS: You may cross examine.

CROSS EXAMINATION

MR. JOHNSON:

Q Where was Lieutenant Wagner when you were conducting this search?
A He was standing holding the door open, I believe.
Q He was present when you found these things in the ventilator?
A Yes, there was several of the other fellows.
Q It is my recollection at the prior trial you testified he was inside and you had to go in and get him and bring [fol. 161] him out and show him the money in the ventilator, is that correct?
A He was standing outside, I didn't go inside.
Q You didn't say you had to go inside and get him?
A No.
Q He was outside?
A Yes.
Q But, he wasn't in the car?
A He was standing by the car, talking with another officer.
Q You were searching it by yourself when you found it?
A No, I was searching it and the gas attendant I know definitely was standing beside me because he spoke up and said, "that's my glove."
Q Yes, but you were the only officer in the car searching, isn't that right?
A Right.
Q Wagner was standing outside, talking to somebody else?
A Yes.
Q You are the prosecutor in this case, aren't you?
A Yes.
Q Were you present the next day when the so called or the line-up was held in the police station?

A Yes, I was.

Q Were you there when Mr Kovacich identified Mr. Chambers?

[fol. 162] A Yes, I was.

Q Tell us about that identification?

A Well, when they notified me they were going to have a hearing at the police station, and I came down and Pete came into the room and he looked at the four fellows—

Q Who came into the room?

A We call him Pete, Mr. Kovacich, he came into the room and he pointed Mr. Chambers out as being one of the fellows and then, he wasn't so sure with the other ones.

Q Were there any other colored men in the room beside these four defendants?

A No, just the four.

Q Did you indicate to him that these were the fellows who had been found in the car?

A No.

Q Did anyone?

A No, I don't believe.

Q Did he know that he was going to attend a line-up or attempt to make an identification?

A I think so.

Q Did he make any remark concerning the other defendants at all?

A He just said that he was not so sure about the other ones.

Q He indicated that they might have been in it?

[fol. 163] A Well, the one it sounded, like one of them might have been, but he wasn't positive of the other one, but he did point Mr. Chambers out that he was the one.

Q Isn't it true, Mr. Cassidy, that he identified Mr. Chambers as having been the fellow who had a blue gun?

A Yes.

Q A blue gun, that's this weapon here, marked as Commonwealth Exhibit 3?

A Yes.

Q He thought Mr. Chambers was the fellow who had a blue gun?

A Well, he didn't say to me.

Q But, you heard him?

A I heard what I have heard here today.

MR. MEANS: I object to the form of the question, the witness said he didn't say that; now, counsel is trying to put words in his mouth.

MR. JOHNSON: Your honor, the witness did say—

THE COURT: He is under cross examination now. [fol. 164] What do you say that this man Pete, or whatever his name is, Kovacich, what did he say to Chambers, what gun, or did he indicate what kind of a gun he had?

A He indicated Chambers had the chrome gun.

MR. JOHNSON:

Q Not the blue gun?

A No.

Q I just asked you a moment ago, if you said—if he said Chambers was the one that had the blue gun, and you said yes?

A No, I was thinking, I meant the other gun.

Q Isn't it true, Mr. Cassidy, that the remark that he made regarding the other three men was that he wasn't —he didn't know whether they were there at all or not?

A Yes.

Q He didn't say he wasn't sure, he said he didn't know whether they were there or not?

A You mean he said he didn't know whether they were there, that's right.

Q There is a difference between that and saying he is not so sure.

THE COURT: Well, you can argue that to the Jury. [fol. 165] MR. JOHNSON: That's all I have.

MR. BLUMENFELD: Nothing.

MR. LEBOVITZ: I have some questions.

MR. LEBOVITZ:

Q Officer Cassidy, do you know how much money was taken from the gasoline station?

A No, I don't.

Q Well, did you know?

A Through the investigation, I was told roughly around $200.00.

Q You say roughly around $200.00?

A Yes.

Q Do you have a specific figure or specific amount given to you?

A In the robbery report that was given to the Chief the following day.

Q You signed the Information, I understand, isn't that correct?

A Yes sir.

Q Do you know whether you gave a specific amount as having been taken from the station?

A Yes.

Q How much was that?

A The Chief has it there.

[fol. 166] Q Did you obtain that knowledge yourself as to the amount?

A Yes, I did.

Q From whom did you get that?

A I got it from the Chief, off the Report, I think it was $211.00.

THE COURT: The indictment shows $214.16.

MR. LEBOVITZ:

Q That's what I want to bring out. Do you, Officer Cassidy, recognize this as your signature on that Information?

A Yes sir.

Q Will you read the amount of money set forth in the Information as having been taken?

A $214.16.

Q Then, that amount was set forth in the Information at the time it was signed, is that right?

A That's right.

Q That was signed before the preliminary hearing before the Magistrate?

A Yes.

MR. LEBOVITZ: That's all.

MR. JOHNSON:

Q Do you know anything today that you didn't know [fol. 167] at the time that you filed that Information regarding the amount of money that was taken?

A No, I don't know any more than I knew before.

THE COURT: Please keep your voice up.

Q Perhaps I didn't understand the prior answer, but did Kovacich tell you $214.00 was taken?

A No.

Q The Chief did?

A The Chief in the Report.

Q And on the basis of his information, you signed that Information on belief, so to speak?

A Yes, the report came in.

MR. TAMBURO:

Q Officer, do you know who Chambers is now in Court, which one of these men is Chambers?

A Yes, I do.

Q He is the man—

A Sitting to the right of you.

Q And isn't it true at the Hearing, that Mr. Kovacich identified Chambers on the basis of his wearing a green sweater?

A Yes.

[fol. 168] MR. TAMBURO: That's all.

RE-DIRECT EXAMINATION

MR. MEANS:

Q Officer, I want to get one thing straightened out with you. You were either confused or testified two different ways about identification of anyone else than Chambers. Now, tell us exactly what he said, when he was asked about this identification—not what you gather from it, what were his exact words when he was asked if he could identify these men when he was looking at them, what did he say?

A We asked him if he could identify any of these fellows that held him up.

Q Did he look at them then?
A He looked at the four of them.
Q What did he say?
A And he picked out Mr. Chambers.
Q What did he say?
A He said, maybe—possible Mr. Lawson, but he wasn't definitely sure.
MR. MEANS: That's all.

RE-CROSS EXAMINATION

[fol. 169] MR. JOHNSON:

Q Officer, now you are saying that he said it might have been Mr. Lawson, but he wasn't sure, is that right?
A Yes.
Q That's contrary to the question I asked you a few minutes ago, isn't it, what you're saying now?
A Yes.
Q What made you recollect that in the last few minutes?
A Well, the way he stated it.
Q The way he stated the questions?
A Yes.
Q That recalled this to your mind?
A Yes.
Q That's exactly what he said, he said that it could have been Mr. Lawson, but he wasn't sure?
A That's correct.
Q Are you aware, Officer that Mr. Kovacich wasn't able to identify anybody at the prior trial of this case?
A Yes sir.
MR. MEANS: I object to that question.
MR. JOHNSON: I think it is proper, Your Honor.
[fol. 170] THE COURT: Well, I think you are developing this into an argument here because you are contrasting the evidence of this witness with evidence of another witness. You can argue that to the Jury, if you want to.
MR. MEANS: I object to it for the reason—

THE COURT: I have sustained the objection let's get along, Gentlemen.

(Exception noted.)

MR. JOHNSON: What is your objection?

THE COURT: I have sustained the objection, it is argumentative. I will put in the objection, it is argumentative, without any question.

(Court recessed at 2:35 P.M.)

(Court reconvened at 2:50 P.M.)

[fol. 171] GUY CICCO, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q What is your name?
A Guy Cicco.
Q Your occupation?
A Chief of Police, North Braddock Borough.
Q Mr. Cicco, you had some part of the investigation of this robbery that occurred at the Gulf Station on May 20.
A Investigating after it occurred.
Q Mr. Cicco, did you interrogate any or all of the defendants after they were arrested by your other officers?
A I did.
Q When?
A The next day.
Q You mean the 21st?
A 21st of May.
Q And who did you talk to?
A I talked to all four of them.
Q Let's start with Mr. Lawson, what was your pro-
[fol. 172] cedure with him, what happened?

A I had the evidence laid out on the desk, asked him if he knew anything of the guns, the money and the cards, and he said that he did not. I told him it was found in his car, asked him if he knew how it got into the car, he said he did not. I asked the other defendants the same questions and they didn't know anything about the guns or the money or the hold-up. I talked to one of the defendants and he admitted being in the vicinity.

Q Who was this?

A Jackson.

Q Were the other defendants present when you talked to Jackson?

A They were not.

Q Now, since they were not present, you have to confine your testimony as to only what Jackson told you as involved him, you may not testify to anything else, and without doing what I told you not to do, what did Jackson tell you insofar as he was involved?

A He told me he was in that vicinity of the Kroger lot.

Q Was he in that automobile?

A He was in an automobile, yes sir.

Q Did he establish the time and the date?

A I really couldn't say about the time, I don't re- [fol. 173] member whether I asked him about the time, not the exact time, within the night before I questioned him, he said he was there.

Q You questioned him on the 21st?

A About the 20th, yes.

Q You were questioning him about the robbery?

A About the robbery, yes sir.

Q He told you he was in Kroger Parking lot?

A Yes.

Q Was it established this is the Kroger lot down the street, Sixth Avenue, from the Gulf Station?

A It was.

Q He was in an automobile?

A Yes, that's right.

Q What else did he tell you without, again, mentioning anyone else? For example, did he get out of the automobile, did he tell you that?

A No, he stayed in the automobile.
Q Did he indicate how long he was there?
A No.
Q Did he indicate where he went when he left?
A Yes, he said he went to Homewood; from Homewood, they stopped at a few places, then, they stopped in Rankin—rather, he stopped into Rankin, sorry.
[fol. 174] Q Did he indicate whether he was a passenger or driver in this automobile?
A Passenger.
Q At all times?
A At all times.
Q And did he tell you whether he knew there had been a robbery at this gas station?
A No.
Q What did he tell you about that?
MR. JOHNSON: Your Honor, may we have a moment at side bar?
THE COURT: Well, I think we have already discussed the matter.
MR. JOHNSON: I would like to have something on the record at side bar out of the presence of the Jury.
THE COURT: Well, all right.

(At side bar.)

MR. JOHNSON: Your Honor, I object to this testimony that's being given. The conversation re-
[fol. 175] lating to Mr. Cicco and Mr. Jackson, that is not admissible against Mr. Jackson, because it is not an admission on his behalf, the sole purpose of the District Attorney in introducing it is to infer guilt against the other three defendants, and clearly, it is not admissible for this purpose, and the groundwork he has laid isn't sufficient to change the Law as we both know that it is. I feel that it is highly prejudicial and would be inadmissible under any circumstances even in the trial of Jackson alone; it certainly isn't admissible against the other three defendants.
THE COURT: We aren't admitting any evidence here against the others.

MR. JOHNSON: I feel contrary, Your Honor,—.

THE COURT: I think we have gone as far as you should go in this. He said he was in an auto-
[fol. 176] mobile there, and I feel we will permit that, that is evidence against him and against him alone.

MR. JOHNSON: It isn't evidence against him.

THE COURT: I think it is, that's where you and I differ. He was in the car there, and the theory of the Commonwealth is that this is the car that was used, the car in which all these things were found later on. What other conclusion could you come to, from that,—it is a matter of circumstantial evidence.

MR. LEBOVITZ: Isn't his objection sustained as to any further testimony?

THE COURT: We will eliminate any further testimony.

(Exception noted.)

(End side bar.)

MR. MEANS:

[fol. 177] Q Did you request the defendant Jackson to give you a written statement?

A I did.

Q Did he do that?

A No, he did not.

Q In your interrogation of Lawson, Chambers, and Ramsey, exactly what did they tell you with reference to being in North Braddock near the scene of that robbery at the time of the robbery?

A They denied it.

Q All?

A All three denied it.

Q Denied being in North Braddock?

A Denied being in North Braddock, denied the evidence presented in front of them.

Q I am particularly interested when you confronted Lawson with this stuff taken from his car, what exactly did he say?

A He said he didn't know how it got into his car, he denied owning it.

THE COURT: Denied owning what?

A Denied owning any part of the evidence.

THE COURT: I don't suppose, according to the [fol. 178] Commonwealth's evidence, I don't suppose he did own it; the question is whether he had it in his possession, is that what he denied?

A Yes.

THE COURT: He didn't know how it got in the car, is that it?

A That's it.

Q Did he tell you where he was—were you able to get from him where he was at the time of this robbery, did he tell you that?

A No, he wouldn't talk about anything.

Q Did you attempt to find out from him?

A I did.

Q Where he was?

A I did.

Q What was his reply to that question?

A He just wouldn't answer it.

CROSS EXAMINATION

MR. JOHNSON:

[fol. 179] Q Chief, you say that the defendants were brought in before you the evidence, as you call it, was laid out on your desk, I suppose?

A Correct.

Q You asked each of them if they knew anything about it or words to that effect?

A That's correct.

Q So, the guns were there, the money, and by the money, you mean the mitt?

A And the bills.

Q You mean that the bills were theirs?

A No, they had to admit the bills were theirs, but I had the bills, the money and the two pistols right in front of them, plus the shells.

Q So, that, in effect, Mr. Lawson admitted that the $31.00 was his?
A Right, the $31.00 was Mr. Lawson's.
Q Didn't he ask you to return it to him?
A He did.
Q His wife asked you to return it to her?
A He did.
Q Now, you testified a moment ago that you gave them an opportunity—gave Mr. Lawson an opportunity [fol. 180] to explain where he had been that evening, is that correct?
A That's right.
Q And he didn't say anything?
A That's right.
Q He just simply denied that he was involved in this?
A That's correct.
Q Didn't tell you a thing about where he had been?
A He did not.
Q He didn't deny owning the car?
A No, he said it was his car.
Q Were you present, Chief, when Mr. Lawson was told that these Exhibits over here on the Jury rail were found in the vent, the air vent of his car?
A Was I present with the other police officers,—no.
Q I understood Lieutenant Wagner to say you were the one who told him where he had found the things?
A Lieutenant Wagner told me.
Q I mean, Cassidy?
A And Charles Cassidy, both of them told me they were found in the vent.
Q Told you that?
A Yes.
Q You told the defendant that?
[fol. 181] A I told the defendant that.
Q You didn't see them in the vent?
A No sir.
Q You weren't there at all that evening?
A No sir.
Q Did Mr. Lawson make any explanation to you of why he had $31.00?

A He told me his wife had given him $31.00, or more than $31.00, this was the change of what his wife had given him.

Q Did she tell you that she had given him that?

A No, she just asked me if she could pick up the $31.00, and I told her at this time she couldn't pick it up.

Q He did give you an explanation of why he had currency?

A Told me his wife give him money.

Q He did make an explanation as to that?

A Yes.

Q In fact, he wanted it back?

A Wanted me to give it to his wife.

MR. JOHNSON: I have no further questions.

MR. BLUMENFELD:

Q Chief, referring to this parking lot, the Kroger parking lot, as has been described by the Commonwealth, the Commonwealth witnesses; the car that they saw [fol. 182] parked in that parking area, could a passenger sitting in that car see the Gulf Station?

A No.

Q Now, referring to the statement that Jackson gave you, Jackson admitted being a passenger in the back seat of a car that was in that Kroger Parking area?

A That's right.

Q He denied all knowledge or involvement in any robbery, is that true?

A That's right.

MR. BLUMENFELD: That's all.

MR. LEBOVITZ: Chief Cicco, you said, I believe, after the Exhibits were found in the vent, you questioned the defendant, you talked to the four defendants?

A I did.

Q Do you recall when that was?

A The next day.

Q That was still the 21st, is that right?

A 21st.

Q Where did you talk to them?

A We had brought them into our police station, four of them.

[fol. 183] Q Then, I believe the Hearing was held?

A On the 22nd.

Q Now, Chief Cicco, isn't it a fact that Henry Ramsey was kept in the Rankin Police Station?

A Ramsey, in what station?

Q I didn't hear you?

A Repeat that question, sir?

Q Isn't it a fact that Henry Ramsey was in the Rankin Police Station?

A That's right.

Q And that he didn't come to North Braddock until the day of the Hearing, just prior to the Hearing?

A On the 20th, 21st, 22nd, that's right.

Q So, that when you talked to the defendants, as you stated, on the next day or the 21st, in North Braddock, you didn't talk to Henry Ramsey, is that right?

A I talked to Henry Ramsey on the 22nd.

Q Where did you talk to him?

A North Braddock Police Department.

Q Under what circumstances?

A I asked him about this—

Q Not what you asked him, where?

A North Braddock Police Department.

[fol. 184] Q Was it in the afternoon or evening?

A Afternoon.

Q Was that after you had already talked to the other defendants?

A To get the records straight, I talked to Lawson and Chambers at the North Braddock Police Department. I talked to Jackson at the Swissvale Police Department. I didn't get to talk to Ramsey until the 22nd of May at the North Braddock Police Department.

Q Do you recall, Chief Cicco, just previously you said you talked to them all on the 21st, isn't that right?

A I believe I did say that.

Q That isn't correct, as far as Ramsey is concerned?

A No.

MR. LEBOVITZ: That's all.

MR. TAMBURO:

Q Officer, continuing on that line, as to Chambers, you also are in error there, too, aren't you, you didn't talk to Chambers on the 21st?

A I most certainly did, the 21st, around four or five o'clock in the evening.

Q Were you with anybody else when you talked to him?

A No.

[fol. 185] Q Isn't it true that at the time you say you talked to Chambers, he was actually in East Pittsburgh Police Jail?

A He was brought back from East Pittsburgh.

Q He was taken to North Braddock, held in North Braddock, then, taken to East Pittsburgh, then brought back to North Braddock from East Pittsburgh, is that correct?

A That's correct.

Q Then, back to East Pittsburgh,?

A No, that's not correct.

Q When was he taken to East Pittsburgh Jail?

A He was taken to East Pittsburgh the morning of the robbery.

Q That would be the 21st?

A Early in the morning.

Q When was he returned to Braddock?

A The same day.

Q And he remained at North Braddock all the rest of the time?

A North Braddock.

Q He was kept at North Braddock the rest of the time?

A Until the Hearing.

Q Which was when?

A 22nd of May.

Q And it is absolutely untrue that the defendant Chambers was taken to East Pittsburgh during the morn-

[fol. 186] ing of the 21st and kept there until Wednesday, the day of the Hearing?

A If I recall, I'll say it is untrue; if my recollection is right, it is untrue.

Q According to what you remember?
A That's right.
Q It could be that way?
A Possibly.
Q It is possible that he was at East Pittsburgh, on the morning of the 21st until Wednesday, the day of the Hearing?
A Possibly could have been.
Q And if this possibility is so, that he was at East Pittsburgh, then, you couldn't very well have talked to him in North Braddock?
A Then, if it is so, then, I talked to him on the 22nd, the morning of the 22nd.
Q You recognize Chambers in Court today, Officer?
A Yes.
MR. TAMBURO: That's all.

RE-DIRECT EXAMINATION

MR. MEANS:

Q Chief, when these guns were taken from the car, were they loaded?
[fol. 187] A When they were turned over to me, they were loaded.
Q I call your attention that these are both .38 calibre pistols?
A Yes.
Q Is there a difference in these guns aside from the color of them?
A The barrel, the one is short and one is long.
Q And the one Commonwealth Exhibit 3, the blue metallic one, that's the long barrel one?
A Yes.
Q And you can see that in the barrel, is that correct?
A That's correct.
Q Exhibit 1 is the short barrel?
A That's correct.
Q And No. 3 is the long barrel?
A Yes sir.
Q Do they both take .38 caliber ammunition?
A Yes.

Q Is there a difference in the ammunition they take?
A One is a long shell and one is a short shell.
Q You could not use the long shell in the short gun, is that right?
A That's right.
Q So, that you have to have different type of ammu-
[fol. 188] nition for the short barrel and the long barrel?
A You could use both in the long, it is dangerous, but you could use it.
Q Mr. Cicco, I will show you what is marked Commonwealth Exhibit 5, which is a diagram, you prepared just on scratch paper here, but showing generally the location of the various areas testified to by some of the other witnesses?
A Correct.
Q And it shows the Gulf Station, the Esso Station, Sixth Avenue, Baldridge Avenue, Linda's house, Kroger's parking lot, and the various entrances and so forth?
A Correct.
MR. MEANS: If there is no objection, we will offer this diagram in evidence.

(No objection.)

MR. MEANS:

Q Now, Chief I just want to clear up one more thing. There has been a little—a lot of talk about the amount of money taken; where did you get your statistics in any of these cases as to what has been stolen?
A The original report states there was $204.16 stolen
[fol. 189] from the Gulf Station.
Q Where does this come from?
A From the owner.
Q So that the police, themselves, wouldn't have any idea what was taken except from the person—
MR. JOHNSON: Objected to as argumentative and calling for a conclusion.
THE COURT: Overrule the objection.
MR. JOHNSON: What was your ruling?
THE COURT: THat's what I said.
MR. JOHNSON: I didn't hear the ruling.

THE COURT: Overrule the objection, can you hear that, allow an exception, let's get along.

MR. MEANS:

Q Do you understand the question, where do they get—

THE COURT: He said, he got it from the owner, a report from the owner of the service station.

[fol. 190] A That's correct.

MR. MEANS:

Q Nothing of your own knowledge at all?

A Yes sir.

The COURT: All right, let's get along.

MR. MEANS:

Q As to the correctness or incorrectness of the amount given by the owner, your investigation wouldn't show why there would be any discrepancy between that and the testimony of Mr. Kovacich, is that correct?

A That's correct.

Q And in turn, Officer Cassidy got his information for the amount you put in the information from you, is that correct?

A That's correct.

RE-CROSS EXAMINATION

MR. LEBOVITZ:

Q I want to clear one thing up, Chief, did you say that your records showed $204.16?

A The first amount, yes sir.

Q Well, the Information has $214.16 in it?

[fol. 191] A Could have been an error, sir.

MR. LEBOVITZ: That's all.

THE COURT: We will adjourn until tomorrow morning.

(Court adjourned at 3:30 P.M.)

[fol. 192] Pittsburgh, Penna.
October 1, 1963.

(COURT opened at 10:20 A.M.)

MR. TAMBURO: May I approach side bar, please?
THE COURT: Yes.

(At side bar.)

MR. TAMBURO: Your Honor, I understand the District Attorney's next witness will involve the presentation of the bullets in evidence that we discussed yesterday, and you said you would rule on it.
THE COURT: Yes. We will overrule the objection and allow an exception.

(End side bar.)

THE COURT: Call your next witness.
MR. MEANS: I have two witnesses on this ammunition.
[fol. 193] THE COURT: Call your witness.

JAMES HEVERLY, a witness called in behalf of the Commonwealth, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q Your full name?
A James Heverly.
Q What is your occupation?
A Assistant Chief of Police, North Braddock.
Q Did you have a part in the investigation of this case?
A Yes sir.
Q What did you do?
A I received a Search Warrant to search the homes of the defendants, and during that search in the home of Mr. Lawson, Mr. Jackson, Mr. Ramsey, we found nothing.

THE COURT: Wait a minute, you found nothing as to who?

A Mr. Lawson, Mr. Jackson, and Mr. Ramsey.

MR. MEANS:

[fol. 194] Q Did you check the residence of the defendant, Chambers?

A The defendant Frank Chambers, on Monongahela Avenue, Swissvale, we found one brown leather holster, also a box of .38 Smith and Wesson shells. There was 33 in that box, and some .38 shells in a top dresser drawer on the right hand side; we found forty-two .38 shells, long.

Q I show you what is marked—Commonwealth hibit 6, and this is a box of shells, and I will ask you if that is the box you found in the residence of Chambers?

A Yes sir.

Q And exactly where was that box of shells?

A Top dresser drawer on the right hand side.

Q These shells are .38 caliber?

A .38 short.

Q And they could be used, for example, in this .38 caliber pistol Exhibit 1, is that correct?

A Yes sir.

Q Now, I will show you a paper bag here which will be marked Commonwealth Exhibit 8, and this bag contains some long and short shells mixed; were these found at Chambers' residence?

A Yes. There was forty-two .38 shells.

THE COURT: They were all .38 shells, were the [fol. 195] not?

A But they are of different make.

MR. MEANS:

Q Is there any difference—

THE COURT: Did you count the ones that were short and the ones that were long?

A Yes, there were forty-four .38 shells long, and three .38 shorts.

THE COURT: You said a moment ago, forty-two, right?

A You said to count them all, that's forty-four, there was two others. These forty-two .38 shells long are of the Dum-dum variety.

THE COURT: Forty-two long shells and three shorts?

A Yes.

THE COURT: Forty-five in all?

A Yes.

MR. MEANS: This bag I have, were these put in [fol. 196] this bag by you?

A Yeah.

Q Were they loose in the drawer?

A Yes sir.

Q They were loose in the drawer?

A Yes sir.

Q I am holding up one of these shells that is a long .38?

A .38 long.

Q And this type of shell could be used in this gun here, which is Commonwealth Exhibit 3, is that correct?

A Yes sir.

Q Now, I notice—you said you used the word, "Dum-dum," and I will show you one of these, is that a Dum-dum bullet?

A Yes sir.

Q What is the difference between a dum-dum, for example, and this?

A The Dum-dum—

Q I take it it refers to the shell, itself?

THE COURT: The bullet.

MR. MEANS:"

Q The bullet, itself, what is the difference between the Dum-dum shown in the long shell, and the regular [fol. 197] bullet, shaped bullet, in the short?

A Well, you take that bullet will go right through you; take that Dum-dum bullet, it will make a hole going in and a bigger hole going out.

Q This Dum-dum flattens out when it gets in your body?

A If it hits an obstruction of any kind, like a bone.

MR. MEANS: We will offer these exhibits 6 and 7 in evidence.

THE COURT: There is an objection, but it is overruled and an exception noted.

CROSS EXAMINATION

MR. JOHNSON: No questions.
MR. LEBOVITZ: No questions.

MR. TAMBURO:

Q I take it you had a Search Warrant, Officer, to go into this house?
A Sir?
Q You had a Search Warrant?
A Yes sir.
Q And how long after the arrest did you go in Chambers' house?
[fol. 198] A May 21st.
Q Do you have the Search Warrant here in Court?
A Yes sir.
Q May I see it?
Did you find any weapons in Chambers' house?
A No sir.
Q Did you ask Chambers how it came to be that he had these bullets in his house?
A No sir.
Q Do you know if anybody asked him?
A Not to my knowledge.
Q So, you don't know why he had them there?
A No sir.
Q Are .38 bullets uncommon?
A Are they uncommon?
Q Yes.
A I'd say not.
Q As a matter of fact, there quite a few .38 pistols around?
A Yes sir.
Q These bullets will fit any .38 pistol?
A If the gun calls for a long or short.
Q In other words, some .38's take long and some take short?

A That's right.

[fol. 199] Q But, actually, you could put a long or short shell in any .38, couldn't you?

A You could put a short shell in the .38 gun used to shoot a .38 long, but it would damage the gun, but you couldn't put a long in a gun calling for a short shell.

MR. TAMBURO: May I approach side bar?

THE COURT: Yes.

(At side bar.)

MR. TAMBURO: Your Honor, I renew my objection to the admission of the bullets in evidence. The Search Warrant does not indicate any reasonable ground for the Officers to come into Chambers' house and take the bullets. It has to set forth in the Search Warrant specifically what they are looking for, and show reasonable reason why they should go into his house. They were just out there searching for anything they could find, there is nothing set down in any way that indicates they were look-

[fol. 200] ing for bullets. I feel it is grossly unfair to let the bullets in evidence and I renew very strongly my objection and I ask that all the testimony be stricken from the Record.

THE COURT: Well, of course, you have known about this from the other trial three weeks ago.

MR. TAMBURO: I wasn't the attorney at the other trial.

THE COURT: But, you knew about it?

MR. TAMBURO: I didn't know a thing about the search Warrant until this morning.

THE COURT: You knew about the evidence about to be introduced, you told me about it.

MR. TAMBURO: It wasn't admitted.

THE COURT: That doesn't mean I have to exclude it now.

You have not conformed to the rules of the Supe-

[fol. 201] rior Court with the suppression of evidence. There are recent rulings by the Superior Court which says what you have got to do, you haven't done it. I think there is reasonable ground for making a

search here, even without a Warrant, and that's also a preliminary matter. We overrule the objection and allow an exception.

THE COURT: Any further questions of this witness?

MR. TAMBURO: No questions.

THE COURT: What time did you go into this house, Officer, you said on May 21st, that would be the day of the alleged robbery, what time was it?

A 9:30 A.M.

THE COURT: 9:30 A.M.?

A Yes sir.

[fol. 202]

RE-DIRECT EXAMINATION

MR. MEANS:

Q Did anyone go with you?

A Yes sir.

Q Who was that?

A Chief Beggs of Swissvale.

Q That's the Chief right here in the Courtroom?

A Yes sir.

Q You mentioned a holster you found there, is that correct, is this the holster?

A That's right, sir.

THE COURT: Anything further, gentlemen?

Q I want to ask one thing, are Dum-dum bullets common?

A I would say not, I have never seen them in that field, but they are used for hunting, but you can take a lead bullet and knick it and get the same effect.

Q These are not hand-made, these are manufactured dum-dums?

A I imagine so.

Q Take a look at them?

A I am not an expert on them.

Q Those are all made the same way, are they not, officer?

[fol. 203] A Yes.
Q Do you see those very often?
A No sir, the first in my experience in 27 years that I have run across that.
MR. MEANS: That's all.

RE-CROSS EXAMINATION

MR. TAMBURO:

Q You didn't know that there were going to be any bullets in the Chamber house when you went there, did you?
A No sir.
Q You were just there to see what you could find, is that right?
A Right.
Q There is nothing on that Search Warrant that in any way indicates you were looking for bullets, is that right?
A No sir.
MR. TAMBURO: That's all.

CHARLES CASSIDY, a witness recalled in behalf of the Commonwealth, testified further as follows:

[fol. 204]

DIRECT EXAMINATION

MR. MEANS:

Q Mr. Cassidy, you are the Officer that found the guns?
A That's correct.
Q When you found them, I believe it's testified these guns were loaded?
A Yes, they were.
Q Did you remove the bullets from the guns?
A Yes sir, I did.
Q And have these bullets been kept in your files since then?
A Yes, they have.

Q I am going to show you two sets of .38 caliber bullets here which I will call Commonwealth Exhibit 8, and ask you if these are the bullets which you removed from the two guns you found in Lawson's car?

A Yes, they are.

Q And I call your attention particularly to the long .38 caliber bullets and ask you if they are Dum-dum bullets?

A Yes, they are.

Q Were these Dum-dum bullets removed from the .38 long you found in Lawson's car?

A Yes, they were.

[fol. 205] MR. MEANS: We will offer Exhibit 8 in evidence. For the record, the Exhibit consists of four .38 long Dum-dum bullets and two empty long cartridges, and five .38 caliber short bullets. You may cross examine.

MR. JOHNSON: Nothing.

MR. BLUMENFELD: No questions.

MR. LEBOVITZ: None.

MR. TAMBURO: None.

MR. MEANS: The COMMONWEALTH rests.

[fol. 206] THE COURT: Open for the DEFENSE.

MR. JOHNSON: I have some Motions that I'd like to make to the Court at this time.

THE COURT: Make the Motions.

MR. JOHNSON: In the presence of the Jury?

THE COURT: I have anticipated the Motions you are going to make, I have made up my mind what I am going to rule. If you put them on the record, I assume, in the first case, in the McKeesport case, you, gentlemen are demurring to the evidence—

MR. JOHNSON: At No. 78 June Sessions.

THE COURT: Yes.

MR. JOHNSON: Your Honor, on behalf of the defendant Raymond Lawson, we enter a demurrer to the Indictment at No. 78 June Sessions 1963, both the first

and second counts. We call to the Court's attention the fact the only evidence at all involving the defendant, [fol. 207] Lawson at this Indictment is the fact that these cards, and the Court is familiar with them, operator's licenses—

MR. LEBOVITZ: Could we do this at side bar, make the Motions?

THE COURT: Yes, I think so.

(At side bar.)

MR. JOHNSON: Involving these cards, operator's licenses and owner's licenses and a Lodge card and so forth.

THE COURT: Overrule the demurrer with permission to proceed, and allow an exception.

MR. LEBOVITZ: With reference to Henry Ramsey, the Indictment at No. 78 June Sessions, with regard to the McKeesport robbery, I demur with respect to the indictment on both Armed Robbery and Receiving Stolen Goods.

MR. MEANS: We will join in the demurrer.

[fol. 208] MR. BLUMENFELD: As to Joseph Jackson, the same Motion.

MR. MEANS: We will join in that.

THE COURT: Sustain the demurrer as to that.

MR. JOHNSON: At No. 91, on behalf of the Defendant Raymond Lawson, we enter a demurrer to the Indictment, the first count alleging Armed Robbery, and call the Court's attention to the fact there has been no identification of the defendant Lawson; the only evidence against him is that the proceeds of this alleged robbery was supposedly found in his car. We, again state, we feel this is insufficient, in itself, to sustain a charge of Armed Robbery, and we ask that the Court sustain a demurrer.

THE COURT: Overrule the demurrer with permission to proceed, allow an exception.

MR. TAMBURO: Your Honor, for the record, [fol. 209] I also would like to demur at No. 78 June Sessions on behalf of Frank Chambers, and at 91, June Sessions on behalf of Frank Chambers, in both cases, I demur.

THE COURT: Make a note in both these cases that the demurrer is overruled with permission to proceed and allow an exception.

MR. LEBOVITZ: At No. 91, Commonwealth versus Henry Ramsey, which specifically charges the defendant with two counts, Armed Robbery and Receiving Stolen Goods, with respect to the Robbery committed in the Borough of North Braddock, I respectfully demur to the evidence and ask that Your Honor sustain the demurrer and discharge the defendant.

(An off the record discussion was had.)

MR. MEANS: I don't think it is very strong either, but, I think it is sufficient.

THE COURT: Overrule the demurrer with per-
[fol. 210] mission to proceed, allow an exception.

MR. BLUMENFELD: I would demur as to Joseph Jackson at No. 91.

THE COURT: Overrule the demurrer with permission to proceed and allow an exception.

(End side bar.)

THE COURT: Are you ready to open for the Defense?

MR. JOHNSON: Ready your Honor.

MR. JOHNSON: I call Barbara Lawson to the stand.

THE COURT: Are you waiving your opening?

MR. JOHNSON: Your Honor, Counsel waives his opening remarks to the Jury and would like to proceed with the case.

THE COURT: Does anyone wish to open for the defendants?

MR. BLUMENFELD: No, we will proceed.

[fol. 211] THE COURT: Proceed with your case first, and if, when you come to the other cases, you may proceed either way, you may open now or later.

MR. BLUMENFELD: Let Mr. Johnson proceed with his.

MR. JOHNSON: We will proceed with our case in chief.

BARBARA LAWSON, a witness called in behalf of the Defendant Lawson, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. JOHNSON:

Q State your name, please?
A Barbara Lawson.
Q Where do you live?
A 209 Vine Street, Braddock.
Q What is your occupation?
A Housewife.
Q Are you married?
[fol. 212] A Yes.
Q Who is your husband?
A Raymond Lawson.
Q The defendant?
A That's right.
Q Mrs. Lawson, are you familiar with the evening and the early morning of May 12 and 13 of this year?
A Yes, I am.
Q Do you recall these dates?
A Yes, May 12 was Mother's day.
Q Would you tell us what happened that evening and early morning?
A Well, that evening my husband and I and our children attended—
THE COURT: Your husband and yourself and who?
A Our three children attended the drive-in movie.

MR. JOHNSON:

Q Attended a drive-in movie?
A That's right.
Q What drive-in movie did you attend?
A Ardmore Theatre.
[fol. 213] Q You were in an automobile I take it?
A Yes.
Q Would you describe the car?
A We were in our car, which is a blue Mercury Compact Station Wagon.
Q What year?

A 1962.

Q What time did you go to this drive-in movie?

A Well, it had just started to turn dark, because earlier my husband, that afternoon his brother had given a birthday party for his child, and my husband went up there to the little party that afternoon.

Q Was anything special about that day, May 12?

A Well, it was special to us because it was Mother's Day.

Q And you went to the drive-in movie that evening around dark?

A That's right.

Q The defendant, Raymond Lawson, your husband, was with you?

A Yes.

Q Your three children were with you?

A Yes.

Q Do you recall what picture you saw?

A The Days of Wine and Roses?

Q The Days of Wine and Roses?

[fol. 214] A Yes.

Q Although it isn't important, I will ask you to recall who played in it?

MR. MEANS: I object to this.

THE COURT: You have a right to designate who played in it.

MR. JOHNSON:

Q Who played in it?

A Jack Lemon, and I believe her name was Lee Remick.

Q Do you recall what time you left the theatre or the drive-in?

A I could not say definitely, no, we attend the drive-in quite frequently during the summer, and it is usually about something to two, it is—sometimes it is a little after two, sometimes about one-thirty.

Q Were there two pictures playing that night, if you recall?

A Yes sir.

THE COURT: I didn't quite get what you said there about one-thirty or something, what did you say about that?

A I said I could not state exactly what time we left [fol. 215] the drive-in theater, I did not take notice of it, the time when we left, and I said we do frequent the drive-in quite often during the summer, and the time varies, it is usually something to two, sometimes one-thirty, sometimes after two.

MR. JOHNSON:

Q I understand your testimony is that then you go to the drive-in theaters frequently in the summer time?

A Yes.

Q Sometimes you get out around one-thirty, sometimes a few minutes before two, sometimes after two?

A Yes.

Q You don't recall what time it was this evening?

A No, I don't.

Q Were there two pictures playing that night?

A Yes, there was.

Q Did you stay to see both of them?

A One was one when we first went, it, was already on.

Q So, you stayed through the end of the second picture, then?

A Yes.

Q Where did you go when you left the drive-in?

A We left the drive-in, we came home, we had a small snack—

THE COURT: What?

[fol. 216] A We left the drive-in and came directly home, I got my children off to bed, my husband and I had a little small snack and we went to bed, he had to be at work at seven o'clock that morning.

Q He did not leave your presence then that evening after you went to the drive-in?

A No, he did not.

Q Did you go to—that evening, did you go to McKeesport?

A No, we did not.

Q You heard the testimony in Court the other day of Mr. Havicon, the filling station attendant, how he was robbed?

A Yes, I did.
Q In the early morning of May 13th?
A Yes, I did.
Q You know where the filling station is?
A No, I am not familiar with McKeesport at all, I do not know.
Q You were not in McKeesport that evening?
A No.
Q You are sure of that?
A I am positive, I can name the occasions I have been in McKeesport.
Q And at all times, your husband was with you? That evening?
A Yes, he was.
[fol. 217] Q After you went to the drive-in?
A Yes.
Q At the risk of being repetitious, I ask this question again, when you got there, it was just after dark?
A Yes.
Q Now, Mrs. Lawson, the next date that I am concerned with is Monday, May 20 of this year; tell us when you saw your husband—last saw your husband the afternoon of that date?
A Afternoon.
Q After twelve o'clock noon?
A Well, I saw him that afternoon—that morning he had gone to work and he does contract work.
Q Your husband is a contractor?
A That's right.
Q He had gone to work that morning?
A That's right.
Q But, he had come home?
A He came home because they were working outside and it rained.
Q Monday, May 20th?
A That's right, he came back home because it was raining and, in the meantime, we are remodeling our home—
Q Remodeling your home?
A Yes, all five rooms. My husband had torn down all [fol. 218] the plaster to the bare walls, insulated and plastered, and we were at the point of painting. Now, he came home that morning from work—

Q About what time?

A About ten-thirty or eleven o'clock, I imagine, I am not sure, and we had paint samples there and we sat and looked over the paint samples and discussed what colors we were going to choose for the house.

Q Were you going to do the interior painting in the house?

A That's right.

Q You had paint samples?

A Yes.

Q You were making a selection as to color?

A Yes.

Q Then, what happened?

A Well, we had chosen the paint and we had various paint stores in Braddock and also one Misco Department Store in Braddock. He had done painting for another woman, it was an extra job, and he had selected her paint for her, from Misco, that's how we had the Misco chart. So, we had chosen the paint, then, in the meantime, I decided since his nephew, who lives in Swissvale, was a Misco member, I told—

Q You have to be a member in order to purchase from Misco?

[fol. 219] A No, you don't, but you get a reduction. So, I told him to go up and see if he could get his nephew, Donald's Misco card.

Q So, you could get a cheaper price?

A We budget our money, we always have, and I called the Misco store and even compared the prices,—if you are a non-Misco member or a Misco member. So, when he left home that afternoon, I cannot state definite time, it was in the afternoon, when he left home, he went to get the card.

Q When he left home that afternoon, you are saying he went to get a card, a Misco card?

A Yes.

Q He was to purchase paint?

A Yes.

Q If you know, did he have any money in his possession?

A Yes, he did.

Q If you know, would you tell us how much?

A I gave him $40.00.
Q $40.00?
A Yes.
Q Do you recall the denominations?
A I cannot, no, I didn't take—
Q What makes you recall the amount?
A Because we were figuring up approximately how [fol. 220] much paint we would need, and we figured close to $40.00, and, as it has been, we have painted since, and it was over.
Q You gave him $40.00?
A Yes.
Q Do you keep the money in your house?
A Yes, I do, my husband has been a hard worker all his life and he has always worked, and we have been married twelve years, he brings his pay home and—
Q Gives it to you and you make the household budget?
A Yes, and he has access to the money if he wants, but we do budget.
Q Do you give him spending money?
A He gets spending money, I don't just allot it to him.
Q He takes that out in the first place?
A Yes.
Q Do you know whether he had any other money besides the $40.00 you gave him?
A To my knowledge he did not.
Q How often does your husband get paid?
A Every Friday.
Q For whom does your husband work, do you know?
A Well, at that time, he was working for Pat Traficanti.
Q Had he been paid the previous Friday, if you know?
[fol. 221] A Yes, he had.
Q Do you recall how much he received?
A I believe it was around $115.00.
Q Is this a normal pay for a week for your husband?
A Yes, he draws from $90.00 to a little over a hundred, it depends upon the weather in the meantime.
Q Now, after your husband left that afternoon, when did you next see him?

A I didn't see my husband again until the morning of the 22nd.

Q You are now referring to Wednesday, May 22nd?

A Yes.

Q Approximately 36 hours afterwards?

A Yes.

Q Where did you see him then, Mrs. Lawson?

A At the North Braddock Police Station.

Q Did you talk to him then?

A Yes, I did, and I also talked to the Chief of Police.

Q Did you make inquiry regarding—from the Police Officers as to why your husband was in custody?

A I made inquiry—they came and searched our house, I think it was either the late morning or early afternoon of the 21st. Two police officers came and searched the house.

Q Was Mr. Heverly one of them?

[fol. 222] A I really don't recall them.

Q Did they tell you at the time they searched the house—why they were searching it?

A No, they didn't, and prior to that, I had only heard from a friend of ours, I didn't know what happened to Raymond that night.

Q When did you first ascertain that he was in custody?

A That morning a friend of the family called me.

Q Who?

A A friend of our family called about nine o'clock in the morning.

Q Is this the 21st or the 22nd?

A 21st, and he told me he had gone up to the Election polls, he told me that they had picked up Raymond the night before, and from that point, I called Raymond's employer, I told him and I called all the Police Stations in our tri-boro, Rankin, Braddock, Swissvale police stations, they all denied knowing anything about it.

THE COURT: Just what does this have to do with the case?

MR. JOHNSON: What's that?

THE COURT: What does that have to do with this [fol. 223] case?

MR. JOHNSON: She was answering—

THE COURT: Why go into all this detail, it has no bearing on the case at all.

MR. JOHNSON: I think the witness volunteered the information.

THE COURT: Well, all right then.

MR. JOHNSON:

Q You say you called the various Police Stations and weren't able to locate him?

A Yes sir.

Q The next day was the 22nd, you found him then?

A No, I contacted an attorney that same day, the 21st, he made a call and he called me back and told me that Raymond was at the North Braddock Police Station.

Q Now, did you talk to Chief Cicco on that day?

A No, I called there from that afternoon up until late that night and they kept telling me that the Chief was not in, and I would just have to keep calling back.

MR. MEANS: This is the same line of question-
[fol. 224] ing.

THE COURT: I can't see what it has to do with the case; certainly there is no admission on the part of the man, no confession here of any kind, that I know of.

MR. JOHNSON: I am trying to get to the question of the money.

THE COURT: All right.

MR. JOHNSON:

Q Did you ask Chief Cicco to return the money found on Raymond's person to you?

A Yes, the next morning his employer and Chief of Police—

THE COURT: The Chief said that's correct, he did ask him and he did refuse to do it.

A I explained to him, too, it was house money.

THE COURT: The Chief admitted he asked for the money, the money is here, it's been offered in evidence.

MR. JOHNSON:

[fol. 225] Q He refused to give it to you?

A Yes, he told me they would have to keep it.

THE COURT: That was quite proper, nothing wrong with that.

MR. JOHNSON:

Q You don't know anything of your husband's whereabouts between the last time you saw him that afternoon and until Wednesday morning, of your own knowledge?

A No, I don't.

MR. JOHNSON: I have no other questions.

CROSS EXAMINATION

MR. MEANS:

Q Mrs. Lawson, as I understand your testimony, when you are referring to the drive-in theater, that was May 13th?

A Well, yes.

Q You went to the drive-in—I am not trying to confuse you, you went on the evening of the 12th and after mid-night, you would be talking about the 13th?

A Yes.

Q And this robbery in McKeesport, I am sure you [fol. 226] are aware, occurred around 2:30 in the morning of the 13th?

A Yes.

Q So, that your testimony is that from the early evening on the 12th right through 7:00 o'clock the next morning, your husband was with you?

A Yes, he was.

Q And how many automobiles do you own, you and your husband?

A How many?

Q Yes.

A Well, we don't own any, now.

Q Well, at the time?

A At that time, we owned two; one wasn't in running condition, it was a gift that was given to us, an old car.

Q The one you were running was the light blue station wagon?

A Yes.

Q What year was it?

A 1962 Comet Mercury.

Q And this is the car you used when you went to the drive-in?

A Yes, the other car, we have never driven.

Q Are you familiar with the vent duct in that Pontiac?

A Pontiac?

Q In the Mercury?

A Yes.

[fol. 227] Q Yes.

A I really—not in detail until all this was brought up, I do know there was a little door, it was quite obvious. Sometimes I opened it for air to come in, I am not sure.

Q This automobile does have this little door in the duct?

A Yes.

Q Then as to the 20th, you say your husband left that afternoon?

A That's right.

Q To get paint?

A Yes.

Q And he was to purchase the paint and bring it back home?

A Yes.

Q And what time did he leave?

A As I said, I cannot testify exactly as to what time it was, it was in the afternoon about 2:30 or 3:00 o'clock.

Q And he went to get paint?

A He went to get the Misco card.

Q And who would that be that he went to get it from?

A From his nephew who lives in Swissvale.

Q Who?

A Donald Wilson.

Q By the way, are you or your husband related to any of these other defendants here?

[fol. 228] A No, we are not.

Q Then, you never saw him again until you found him in Jail on the 22nd?

A Yes.

Q And did he ever get the paint?
A No, he hadn't.
Q Among the money you gave him that day, did you give him a two-dollar bill?
A No, I didn't.
Q When he didn't come home by the early morning of the 21st, what did you do, were you worried about him?
A I became very upset, yes.
Q Is this unusual for him to go out and not come back without any word?
A That's right, and I had called—made some calls and I called his brother—
Q You made some inquiries to locate him?
A That's right.
MR. MEANS: That's all.

BEULAH JONES, a witness called in behalf of the [fol. 229] defendant, Lawson, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. JOHNSON:

Q Your full name?
A Beulah Jones.
Q Where do you live?
A 205 Miller Street, Rankin.
MR. MEANS: I think we had better ask for an offer.

(At side bar.)

MR. JOHNSON: This woman will testify that she owns a tavern called Scales, that on the afternoon in question, May 20, all four of these men were in her establishment drinking, they were drinking heavily, they were there until 9:30 or 10:00 o'clock that evening, perhaps even later; that they had money, that they were paying for the drinks and the [fol. 230] defendant Lawson had at least a twenty dollar bill in his posession while they were there.

THE COURT: I think that's proper.

MR. MEANS: What does it prove?

THE COURT: The question here is, you see, the position of the Commonwealth, I assume, is that this money was found on Lawson, the $31.00, was taken in this robbery. Now, if he had money previously, paying for drinks and that, that would tend to disprove that.

MR. MEANS: All right.

(End side bar.)

MR. JOHNSON:

Q Are you employed, Mr. Jones?
A I run a tavern.
Q You run or operate a tavern?
A Yes, I own it.
Q Pardon?
A I own it.

[fol. 231] THE COURT: In Rankin?

A Yes, in Rankin.

MR. JOHNSON:

Q Do you know any or all of the four defendants in this case?
A I know them all.
Q Can you identify them, beginning from left to right?
A Yes.
Q Do so, please?
A Raymond Lawson, Joe Jackson, Henry Ramsey, Frank Chambers.

MR. JOHNSON: Let the record show, Your Honor, that the witness identified four defendants.

THE COURT: She testified to that.

MR. JOHNSON:

Q Now, the day in question, that we are interested in, Mrs. Jones, is May 20th, a Monday of this year. Did you see any or all of the defendants?
A Yes, I did.
Q Where did you see them?
A In the tavern.

[fol. 232] Q Do you recall what time they came into the tavern?

A No, I really don't, but I know it was in the afternoon.

Q Do you recall when they left?

A No, I really don't.

Q Have any idea at all?

A Well, they left one part of the late afternoon and then they came back, they came back again.

Q Do you recall when that was?

A No, I really don't, I know it was later.

THE COURT: What's that?

A It was later, say after six o'clock, when they came back.

MR. JOHNSON:

Q Could you say it was before ten o'clock that they came back?

A Oh, yes, it was before ten o'clock.

Q They left, and came back, but you are not sure when they came back, before ten o'clock?

A Yes sir.

Q Will ask you again if you recall or have any idea when they left?

A No, I really don't.

Q Do you know whether they left alone or together [fol. 233] or in any combination thereof?

A No, because I was busy and I couldn't tell you how they left.

Q Were you tending bar at the tavern that day?—Mrs. Jones?

A Yes, I was.

Q Were they buying drinks?

A Yes, they were.

Q Were they paying for these drinks?

A Yes.

Q The point I am trying to get at, they were paying for these drinks with money?

A Yes.

Q Do you recall as to the defendant Lawson, if he had any money—I will withdraw that and ask this, do

you have any idea as to how much money Mr. Lawson had with him that day, if you know?

A No, I really don't know how much he had with him, but I do know that he had a twenty dollar bill and I couldn't break it, I had to send him downstairs to my uncle to get the change, that, I remember.

Q You recall when that was?

A That was in the afternoon.

Q Were these gentlemen drinking all the time they were in the tavern, Mrs. Jones?

[fol. 234] A Yes, they were.

Q Were they visibly intoxicated?

A They were pretty high.

THE COURT: You mean you sell intoxicants to people who are intoxicated?

A When they are getting high in the place, sure, I sell it; they weren't that high, but, you know—

THE COURT: I don't know, we are asking you, were they intoxicated when you were selling them drinks, were they, or were they not?

A They were getting intoxicated, yes.

MR. JOHNSON:

Q You don't recall when they left?

A No, I really don't.

Q You don't know how they left?

A No, I don't.

Q Whether it was on foot or in a car?

A No.

Q Whether they left together, or any thing else?

[fol. 235] A No.

MR. JOHNSON: I have no other questions.

CROSS EXAMINATION

MR. MEANS:

Q Your tavern is where?

A 205 Miller Street, Rankin.

Q And what time of the day did these four come in, you say they came in together?

A Well, I didn't say they all came in together, I said they were together.

Q They were together in the tavern?

A Yes.

Q This was in the afternoon?

A Yes.

Q What time in the afternoon?

A I couldn't tell you,

Q Early afternoon, late afternoon?

A They were in the tavern, say, between four and four-thirty; that's the early afternoon, right?

Q All right, then, they were drinking, is that correct?

A Yes.

[fol. 236] Q All four of them?

A Yes.

Q Do they come around to your tavern often?

A Yes.

Q All four of them?

A Yes.

Q Come in together often or in there together often?

A Yes.

THE COURT: I didn't hear what you said, what did you say?

A I said, yes, they would be together.

THE COURT: Prior to this time?

A Oh, yes.

MR. MEANS:

Q In other words, the four defendants would quite often hang around in your tavern and drink together, it wasn't unusual?

A You know, how people come in and get together.

Q And then, what were they drinking, liquor?

A Some of them drinking liquor and some drinking beer, and some wine.

[fol. 237] Q And this went on from four or four-thirty in the afternoon until what time?

A They left and I couldn't tell you what time they left, and I couldn't tell you what time they came back, but they were there in the early evening, early afternoon and evening.

Q Around ten o'clock they were there?

A They were there all evening but I couldn't tell you what time they left?

Q When they left, were they drunk?

A No, they wasn't drunk, but they were pretty intoxicated.

Q Feeling good?

A Yes.

Q Happy, but they could all walk and get along all right, didn't have to carry each other out or hold each other up?

A No, they didn't have to carry each other out.

Q Do you know they had to drive a car? They had been driving a car?

A To tell you the truth, I didn't pay it any attention.

Q When you serve people in your bar and they are getting a little drunk, aren't you concerned as to whether they are going to go out and get in an automobile?

A Well, I didn't associate it with that.

Q As a tavern keeper, aren't you concerned with a [fol. 238] person getting intoxicated as to whether they are going next, if they are getting into a car?

A If they are really that drunk, I am interested.

Q You would be, I would think, as a good tavern keeper?

A Yeah.

Q And these men, I take it, none of them were so drunk they couldn't drive a car or you wouldn't have kept serving—

MR. JOHNSON: I will object to the question as being argumentative.

A I couldn't tell you that.

THE COURT: Overrule the objection.

(Exception noted.)

A I really couldn't tell you that.

THE COURT: She said they were high, as she expressed it, feeling good, they were able to walk out.

MR. MEANS:

Q At least, is this fair to say that when they left, you weren't concerned about any of them being so intoxi-
[fol. 239] cated they couldn't drive?

A Well, really, I didn't associate it that way, I mean, that they were high, but I wasn't thinking of them as driving.

Q Isn't this one of your duties as an operator of a tavern to be a little concerned about how high people were getting?

MR. JOHNSON: I object to this question as being irrelevant and competent, having nothing to do with the issue here.

MR. MEANS: I am testing her credibility.

THE COURT: I think we have gone far enough on this matter.

MR. MEANS:

Q Well, let me ask you this then, you say Mr. Lawson apparently had spent enough money where he had to break a twenty dollar bill, and this was in the afternoon?

A Yes.

Q And they changed the twenty dollars for him?

A Yes.

Q Then, they kept right on drinking on and off until they left in the evening?

A Yes.

[fol. 240] Q And he spent more money?

A Yes, he spent more money.

MR. MEANS: That's all.

MR. TAMBURO:

Q Do you recall if Mr. Chambers was spending any money?

A All the fellows were spending money.

Q Including Mr. Chambers?

A Yes.

MR. TAMBURO: That's all.

RAYMOND LAWSON, a defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. JOHNSON:

Q You are Raymond Lawson?
A Yes sir.
Q Where do you live?
A 208 Vine Street in Braddock.
Q Are you employed?
A Yes, I am.
[fol. 241] Q How are you employed, Mr. Lawson?
A I am employed as a scaffold builder and mortar mixer for Sam DePollito.
Q Construction work?
A Yes.
Q Have you been in this type of work very long?
A Yes, I have been doing this type of work since I have been about sixteen.
Q Steadily employed?
A Yes, on the side, I take small remodeling and repairing jobs myself.
Q You do some work in addition to working for someone else on your own?
A That's right.
THE COURT: How old are you?
A Thirty-two.

MR. JOHNSON:

Q Are you married?
A Yes.
Q This is your wife who testified earlier?
A Yes.
Q You are the defendant in this case?
[fol. 242] A Yes.
Q Mr. Lawson, I am concerned with the evening of May 12, and early morning of May 13th, 1963, do you recall where you were that evening?
A Yes.

Q Tell the Court about it and the Jury?
A In the afternoon, my brother gave a party for his child, and I went up for a while and took the present up to my brother, and then, I came back. My wife wanted to go see "Days of Wine and Roses". We went to the drive-in.
Q Do you recall what drive-in you went to?
A Yes, we went to the Ardmore Drive-in.
Q Go ahead.
A We went to the drive-in, and, well, we had snacks for the kids at the drive-in, and things like that, to try to make the day as enjoyable as possible.
Q Do you recall when you left?
A I know it was after one, we usually stay pretty late at the drive-in, usually most of the time the kids are asleep, my girl is asleep and the baby, most of the time, is asleep a lot while I am there at the drive-in.
Q Were you sleeping that night?
A I took a little nap.
[fol. 243] Q You don't recall when you left exactly?
A No, I don't.
Q You heard the testimony given by the Commonwealth witness Havicon, on Friday of last week, regarding this alleged hold-up or robbery in McKeesport?
A Yes, I did.
Q I ask you, were you in McKeesport that evening, Mr. Lawson?
A No, I wasn't.
Q There has been testimony here about a blue car—
THE COURT: Mr. Johnson, were you going to follow this out, his wife said they went home and went to bed.
MR. JOHNSON: All right.

MR. JOHNSON:

Q There has been a great deal of testimony about a blue car, do you own a blue car?
A I did own a 1962 Mercury Comet Station Wagon.
Q 1962 Mercury Comet Station Wagon?
A Yes.

Q No question about the model or make or body style?
A No.
[fol. 244] Q Was the title in your name?
A Yes.
Q Only?
A Yes, that's right.
Q Was this the car you drove to the drive-in theater that evening?
A Yes, it is.
Q And your wife and you and family were in it?
A Yes.
Q After you left the drive-in theater that evening, where did you go?
A Well, as my wife said, we went straight home and had a snack. We took the kids to bed and I went to bed, I did have to get up early the next morning,
Q Do you recall what time it was?
A I know it was after two.
Q Did you leave your house that evening?
A No, I didn't.
Q Didn't go any where?
A No, I didn't.
Q Not even to the store or anything of that sort?
A I didn't leave the house.
Q You were not in McKeesport that evening?
[fol. 245] A I was ot.
Q Before we go any further, do you know the other three defendants in this case?
A Yes, I know them all.
Q How long have you known them?
A Well, I have known Frank and Henry since we was children together.
Q Frank and Henry since you were children?
A Yes.
Q How long have you known Mr. Jackson?
A I have known him a couple years, he wasn't raised around where we were raised.
Q Where were you raised?
A I was raised in Rankin.
Q That's where you live presently?
A No, I live in Braddock now.

Q Do you see them very often?

A I see them a lot of times when I used to stop up at the tavern or up my brother's, they all live in the close vicinity up there, and I usually see them, most of the time I am on the way from work or maybe I stop in the evening, I see them quite often.

Q Are they employed, if you know?

[fol. 246] A I don't think so, I don't know for sure.

Q We are next concerned with the events of Monday, May 20, approximately a week after this alleged robbery in McKeesport. You heard your wife's testimony a few minutes ago, was that essentially—would you corroborate that testimony or do you have any change regarding what happened up to the time you left her presence.

A That's about what happened.

Q She testified you were going out that afternoon for the purpose of purchasing paint, I believe,—?

A Yes.

Q To be used for some interior painting in your home?

A Yes.

Q Incidentally, do you own your home?

A We are buying it.

Q Why weren't you working that day, Mr. Lawson?

A Well, I stayed out on the job until 10:30 or 11:00, something around there, and nobody else showed up, it was a light rain and I called my boss and told him I was going in, and I told him I was going in.

Q You weren't working because it was raining?

A Yes.

Q Where did you go after you left your home and [fol. 247] your wife that afternoon, do you recall what time that was?

A Yes, I went home from work, I don't know, it was right after noon, I believe, and I went home and explained to my wife why I wasn't working, and we talked it over about the paint, the money—

Q Do you recall what time you left the house?

A No, it was after noon, I know.

Q Were you alone?

A Yes, I was.

Q Where did you go?

A I started up Swissvale to get the Misco card from my nephew Donald.

Q You went some place else?

A No, I went up his house and he wasn't home.

Q You went to Swissvale and he wasn't home?

A No.

Q Why did you go up there?

A I went up to get his Misco card.

Q Then, what happened?

A So, when I found him, he was across the bridge in Rankin, he saw me, he told me my sister was looking for me to take her home.

Q Why would you take her home?

[fol. 248] A She had been to a funeral and she was stranded.

Q Over where?

A In Homestead.

Q Now, when you ran into your nephew, where was he, again, in Rankin?

A Yes, he was down at Scales.

Q He was in Scales Tavern?

A Yes.

Q That's the Tavern operated and owned by Mrs. Jones?

A Yes.

Q You went to Scales Tavern after you left your nephew's home?

A That's right.

Q When you were there, you said something about your sister had to go to a funeral and she wanted to be taken to Homestead?

A Yes.

Q Did you have anything to drink when you first to Scales?

A Well, I bought my nephew a couple drinks, I asked my sister how soon she would be ready to go and she said about a half hour.

Q Where was she, in Scales?

A No, I think two doors from Scales, some people's apartment down the street, and she told me it would be

about a half hour before she was ready to go, so, I start-
[fol. 249] ed—me and my nephew had a couple drinks in Scales, and my sister came down and I offered to buy her a drink, and she drank a coke, then I took her over to Homestead.

Q Were any of the other three defendants in this case in the tavern when you first arrived?

A They weren't there. I think Jackson came in while I was sitting in there, he came in, I believe, we had a drink together.

Q This was still in the afternoon?

A Early afternoon.

Q Late or early?

A I'd say it was early afternoon, about one or two o'clock, something like that.

Q Then, you say you took your sister to Homestead?

A Yes.

Q She went to a funeral?

A Yes—

No, she was going home from the funeral, the funeral was over.

Q She lives in Homestead?

A Yes.

Q You took her home?

A Yes.

Q What did you do when you got over to Homestead?
[fol. 250] A Me and my nephew stopped at her husband's bar, he has a bar in the cellar and we had a couple more drinks over there.

Q How long were you there?

A I don't know, we were just sitting down, talking and it might have been an hour, might have been forty-five minutes, something like that.

Q You left with your nephew again?

A Yes.

Q Where did you go then?

A I got my nephew back.

Q Incidentally, did Mr. Jackson go with you?

A No, he didn't. I brought my nephew back to Swissvale and I dropped him off.

Q Where?

A No, we stopped by Scales Tavern again.

Q Back in Rankin?

A Yes, we are back in Rankin now and we had a couple more drinks in there. Well, I was really goofing the money up, I wasn't blowing all of it, you know—

Q Let's ask about this money, your wife testified she had given you forty dollars that day, is that correct?

A Yes, she did.

Q Did you have any other money besides the $40.00 she gave you?

[fol. 251] A I might have had a dollar and some change, It didn't amount to anything.

Q In other words, all this drinking you were doing was coming from your paint money, so to speak?

A Well, yes, well, I had sort of figured it out in my mind where I could—with this Misco card—I had told her it would cost around $40.00, and I figured out in my mind there would be a couple extra dollars with the Misco card, I knew I was still safe.

Q How much had you spent by this time, if you know?

A I don't know exactly, I imagine about three or four dollars.

Q What were you drinking, do you recall?

A Small Old Hickory and Duquesne.

Q You wouldn't get more than three or four drinks for that three dollars?

THE COURT: Is that whiskey?

A Yes.

MR. JOHNSON:

Q All right, what happened then after you got back to Scales?

A We sat around and then the fellows started coming in one at a time.

Q By the fellows, you mean the other defendants?

[fol. 252] A Yes.

Q Was Jackson in the bar when you got back there?

A I don't know whether he was in there or whether he came in there or came in later, how it happened, but it ended up we were all in there drinking.

Q Do you recall how any of the other defendants came in?

A No, I don't.

Q Or when?

A No, I don't.

Q Whether they were together or alone?

A No, I don't recall whether they were together or alone.

Q So, you were drinking with them, what time was it by then?

A This was getting on to the evening then.

Q Where was your nephew?

A My nephew had left, he had gone back up to Swissvale.

Q Did you take him home?

A It's right across the bridge, he walked home.

Q Did the other defendants have money, were they paying for—I'll withdraw that question.

Were the other three defendants drinking, too?

A Yes, they were.

Q Did they have money and were they paying for these drinks?

A Yes, they were.

[fol. 253] Q You weren't buying the drinks for everyone?

A No, I'd buy a round, we were shooting pool, and generally horsing around.

Q What time did the Misco store close?

A I think it closes at six.

Q You decided you weren't going to buy the paint that day?

A The paint had escaped my mind about then.

Q What time did you leave Scales that day finally?

A I don't know, it was late in the evening when we left. We decided—we were there talking—and my brother works over at the Paradise Club in McKeesport, and we decided to go over and see—we call my brother Tiny—we decided to go over to the Paradise Club, it was new, and hadn't been opened too long.

Q Do you go to McKeesport very often?

A No, I have never been over there.

Q You have never been to Tiny's Paradise Club?
A No, I never been there. I started over there a couple times.
Q Have you ever been in McKeesport at all?
A Yes, I have been in McKeesport, but I have never been in that club.
Q But you don't recall what time you left Scales?
A No, I don't.
[fol. 254] Q Who did you leave with?
A Well, the four of us were together.
Q By the four of us, you mean the three other defendants and yourself?
A Yes.
Q Did you leave on foot or by car?
A We left by car.
Q Who was driving?
A I was driving.
Q Who was sitting in the front seat?
A I don't recall who was sitting in the front seat. I don't recall.
Q I don't suppose you recall who was sitting where?
A No, I don't recall.
Q You were supposedly about to drive to the Paradise Club in McKeesport, is that correct?
A That's correct.
Q Where, in fact, did you go?
A I stopped down at the Gravity Fill on Braddock Avenue in Braddock.
THE COURT: Stopped where?
A At the Gravity Fill Gasoline Station in Braddock, [fol. 255] on Braddock Avenue.

MR. JOHNSON:

Q What oil company owns or operates the station?
A Gulf.
Q You drove to a Gulf Gravity Fill Station on Braddock Avenue? In Braddock?
A Yes.
Q Now, is that the station that Mr. Kovacich was the attendant?

A I don't think so.

Q He also testified that was a Gulf Gravity Fill Station.

A Well, Yes, I don't think.

Q Was Mr. Kovacich the attendant?

A No.

Q Do you know where the station is that he was attending that evening?

A I have a general idea, I don't know exactly where it is.

Q The testimony is that he is at the intersection of Sixth and Baldridge in North Braddock, do you know where that is?

A I know where Sixth Street is, I don't know exactly where Baldridge is.

Q You don't know exactly where the Gulf Station is?

A No, I couldn't tell you how to get to Baldridge Street.

[fol. 256] Q How far is North Braddock from Braddock?

A I think some parts of North Braddock start a couple blocks up from Braddock Avenue.

Q In other words, they adjoin?

A Yes.

Q Are they two independent communities or part of one?

A I think two independent communities.

Q You drove to the Gulf Station on Braddock Avenue in Braddock?

A Yes.

Q It wasn't then, the station that was alleged to have been robbed, is that correct?

A That's correct.

I got a dollar's worth of gas there.

Q What time did this happen?

A I don't know.

THE COURT: You got a dollar's worth of gas at this Gravity Fill?

A Yes, in Braddock.

MR. JOHNSON:

Q Drove your car into the station?
A Yes.
[fol. 257] Q Pulled up beside the pump?
A Yes, and ordered a dollar's worth of gas.
Q You paid for that?
A Yes, I did.
Q You don't recall the time?
A No, I don't.
Q You didn't see Mr. Kovacich?
A No, I didn't see Mr. Kovacich.
Q What happened then?
THE COURT: Wait a moment, I'm a little confused, is this the Station—
MR. JOHNSON: No, it is not the station.
THE COURT: All right.
MR. JOHNSON: Where did you go when you left?
A I pulled out of the station and I realized then that I had been drinking too much to drive, and I was pretty sleepy.
Q You pulled out of the station and realized you were getting sleepy?
A Yes.
Q So, what happened?
[fol. 258] A I was nodding pretty heavy, I pulled across the street and I said, "somebody is going to have to take the wheel."
Q Why?
A Because I knew I was going to go to sleep if I continued to drive, and I was afraid of an accident.
Q So, what happened?
A Somebody got behind the wheel.
Q Do you know who?
A No, I don't.
Q Where did you go?
A I went in the back seat and curled up and laid against the arm rest, the side of the station wagon, and I went to sleep.
Q You mean you didn't care whether somebody else drove your car or not?

A No, I didn't care—I didn't particularly care whether—they wanted to go and—

Q They still wanted to go to McKeesport?

A Yes, that's where they struck out for.

Q You let somebody who was obviously and probably intoxicated drive your car?

A Yes, well, I figured that I had a little more to drink than they because I had been drinking before I ran into them, see.

Q So, you got out and got in the back seat?

[fol. 259] A Yes.

Q What happened then?

A Well, I curled up and went to sleep myself.

Q You fell asleep?

A Yes.

Q You don't recall who was driving?

A No, I don't.

Q Or who was sitting where?

A No, I dont'.

Q Do you know whether you were in the vicinity of this Kroger parking lot on Sixth Street in North Braddock any time that evening?

A No, as far as I know, we weren't in that vicinity.

Q Do you know where this parking lot is?

A Yes, I do, I know where the Kroger parking lot is.

Q It has an entrance from Baldridge, a minute ago, you said you didn't know where Baldridge is?

A I know the entrance going up Sixth Street, there is a big entrance going up Sixth Street, in fact, I didn't know there was another entrance to it.

Q Do you know Kovacich, the gentleman with the one arm, the attendant at the filling station?

A The first time I ever seen that man in my life [fol. 260] was at a Hearing in North Braddock.

Q Have you ever seen Linda or Jerry Klaus?

A I don't ever having seen them, no.

Q You don't know them?

A No., I don't.

Q What about John Havicon?

A No, I have never seen him before.

Q You say you fell asleep?
A Yes.
Q Do you recall how long you were asleep?
A I don't know, I don't recall how long I was asleep.
Q Tell us what happened when you woke up?
A When I woke up, the car had been bumping, it was getting a flat, I have tubeless tires, and we were some place in the vicinity of coming off—like coming around off the Westinghouse Bridge.
Q You were in the vicinity of the Westinghouse Bridge?
A In East Pittsburgh.
Q Your car was bumping?
A Yes, it was over to the side and everybody was getting out and I got out and started loosening the spare tire.
Q Who was driving?
A I don't know who was driving.
[fol. 261] Q You mean to say you don't know who was driving?
A I don't know, I don't know who was driving.
Q You mean to say you were in the car, the car gets a flat tire, you got out and you don't who was driving?
A I don't know who was driving.
Q Why?
A I was asleep and I more or less—I don't know—I was just in more or less a stupor.
Q Who was sitting next to you?
A I don't want to tell a lie now.
Q If you know, I am only asking you to tell if you know?
A I don't know.
Q You don't know?
A That's right.
Q All right, what happened then?
A We were changing this tire, everybody was out of the car and we were changing this tire, and the police officer pulled up across from us.
Q A police officer?
A Yes.

Q Go ahead.

A And I think he thought we stealing hub caps or something, he pulled up beside us and asked us what [fol. 262] was the trouble, and I said, nothing, we had a flat tire, and he stood there while we fixed the tire.

Q Do you know what Municipality he was from?

A I think he was from Pittsburgh.

Q You changed the tire?

A Yes, we changed the tire.

Q Who changed the tire?

A The four of us were out of the car, one guy had the tire iron, I grabbed the tire myself, somebody loosened the lug bolts—I mean, everybody worked together, we had the tire changed in a couple minutes.

Q You were sound asleep and you mean to tell us you were now wide awake, you were capable of changing a tire?

A You don't have to be that wide awake to change a tire, you know, I was changing—

Q You changed it or somebody else?

A We all worked together changing it.

Q Did the police officer help you?

A No, he just stood across the street and watched us until we got finished.

Q He didn't ask you any questions beyond the one that you testified to?

A No, he just asked us if we had any trouble.

[fol. 263] Q Where did you go then?

A We drove from there out to Homewood on Frankstown Avenue.

Q Yes.

A Just riding around then,—I drove from there out to Homewood Avenue.

Q You got back in and drove this time?

A Yes, that's right, I was a little upset behind the flat tire because my car had only 12,000 miles on it.

Q What were you upset about it?

A I noticed that the tire that got flat, it was out of line, that it wore most of the tread off one side, and we drove on out to Frankstown Avenue.

Q The tires weren't wearing properly?
A Evenly.
Q And you drove out to Frankstown Avenue, what happened then?
A We stopped by a couple places out there, I didn't drink anything else.
Q Did you still have any money?
A Yes, I did.
Q How do you know?
A I bought a couple drinks I believe, I didn't have anything to drink myself.
Q Do you recall how much you had?
[fol. 264] A No, at the time, I didn't recall exactly how much I had, I knew—
Q Were you feeling better?
A Yes, I was, usually if I go out to a party or anything like that, it seems like a little nod or nap—
Q You were all right then?
A Yes.
Q How much money did you have?
A I knew—I thought I had about $33.00 or $34.00, that's what I thought I had.
Q What happened after you left there?
Were the three defendants here still with you?
A Yes, they were. We came back through Swissvale, and when we came back through Swissvale—
Q Driving from Homewood to where were you going?
A Back through Swissvale, coming back to Rankin then, and I was going to let the guys off, you know, and go on in then.
THE COURT: Let them off, where?
A Usually in the vicinity of the Glass House Bridge, we call it, most of them live in the same vicinity.
MR. JOHNSON: As you were going to Swissvale, [fol. 265] what happened then?
A Somebody saw this police car behind us, and he just seemed to be staying pretty close to us, you know—
THE COURT: Mr. Means, you wanted to go to the Doctor, did you not?
MR. MEANS: I have to have this eye looked at.

THE COURT: Yes, I thought perhaps you would call my attention to it. We will excuse the Jury until 1:15.

(Court recessed at 11:50 A.M.)

(Court reconvened at 1:20 P.M.)

MR. JOHNSON: Your Honor, I would like at this time to call a witness out of order and we will put Mr. Lawson back on to finish his Direct Examination.

THE COURT: All right.

PAT TRAFICANTE, a witness called in behalf of the [fol. 266] defendant, Lawson, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. JOHNSON:

Q Your full name?
A Pat Traficante.
Q Where do you live?
A Monroeville.
Q Are you employed?
A No, I have my own business.
Q You are self-employed?
A Yes.
Q What is the nature of your business?
A General contractor.
Q Do you know the defendant Raymond Lawson?
A Yes, I do.
Q Can you identify him in the Courtroom?
A Right there.

MR. JOHNSON: Would you stand up, Raymond?

A Yeah, that's him, right.

MR. JOHNSON:

[fol. 267] Q How long have you known Mr. Lawson?
A About fifteen years.
Q Fifteen years?
A Yes.

Q Under what circumstances have you known him?
A Well, he has worked for me off and on for about 15 years.
Q When you say worked for you, you mean employment?
A Right.
Q Mr. Traficante, we are concerned with just one minor thing here, that I think you may have that is relevant to this issue. Was Mr. Lawson working for you in May of this year?
A Yes, he was.
Q Where was he working?
A Monroeville, Pennsylvania.
Q A construction job?
A Right.
Q He was on your payroll?
A Right.
Q How often did he get paid?
A Once a week.
Q What day of the week?
A Friday.
Q Every Friday?
[fol. 268] A Every Friday.
Q Did he receive a pay on May 17?
A Yes, he did.
Q Which was a Friday?
A Yes.
Q Do you know how much?
A A hundred ten dollars.
Q You have some records to support that?
A Yes.
Q You are referring to those records when you give us the amount?
A His gross pay was $110.00, his net was $98.00.
Q He received $98.00 in cash?
A Yes.
Q Was he still working on this job on the following Monday?
A Yes, he did, he worked Monday.

Q There has been testimony here, I don't know if you heard it, that he had to leave work that day because it was raining; do you have any recollection about this?

A I don't recall whether he did, I am sure he worked that Monday, maybe for an hour or two, I don't recall.

MR. JOHNSON: That's all, thank you.

[fol. 269] CROSS EXAMINATION

MR. MEANS:

Q You don't know anything about the robberies he is charged with, or anything concerning it, you are not a witness about the robbery?

THE COURT: No, no, obviously he is not, he wasn't asked about it.

RAYMOND LAWSON, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION (continued)

MR. JOHNSON:

Q I believed you last testified, Mr. Lawson, before the noon recess, that you were driving your car and you noticed a police car following behind you, you recall your saying that?

A Yes, I do.

Q Tell us what happened then?

A Well, one of the fellows noticed this police car behind and we were going down—he didn't make any attempt to stop—

[fol. 270] Q This was in Swissvale?

A Yes, and he didn't make any attempt to stop us, I thought maybe he might have been watching to see whether I was drinking or speeding, and I drove at normal speed, I kept my normal speed, and went down to the parking lot behind Scales.

Q This is a parking lot behind Scales Tavern?

A Yes, it is the one everybody uses, there is no parking on the street.

Q What happened then?

A When we pulled down in the alley, we call it an alley, I don't know, the name of the street until it was testified in Court—

Q —Was the name of the street testified to in Court?

A Yes, it was.

Q Well, it is not important if you don't recall.

A We got out of the car and we started walking back up the alley, and the police car pulled up and told everybody to go back by the car.

Q Was this the car that had been following you through Swissvale?

A Yes, I believe it was.

Q Did you recognize the officer who was in the car?

A Yes.

Q Was it Officer Herman?

[fol. 271] A I don't see him in Court now.

Q He told you to go back to the car?

A Yes.

Q Now, you and the other three defendants got out of the car?

A We got out of the car—walking.

Q Toward the tavern?

A Yes, and he told us to go back to the car, and we walked back to the car and we all asked him what was the matter, and he said, "Just stand by the car."

Q He didn't give any other information?

A No, and we stood by the car, and this other police car from Swissvale came down and the two of them, one was facing my car and—both of them was facing my car, but one was facing it from the back and the other one was more or less facing from the side.

Q Was Lieutenant Payne there?

A No, he wasn't there yet.

Q Go ahead.

A We kept asking him, "What's the matter," and they still—well, they said, "We are going to call Lieutenant Payne up, he will be here in a few minutes, just

stand by the car," and they were making calls on the microphone.

Q The radio?

[fol. 272] A Radio, and after a while, Lieutenant Payne came up and he asked them if they had searched us, and they said no, so they proceeded to search our bodies.

Q Now, what sort of a search did they conduct?

A Well, they made us put our hands on the car, and patted us and you know,—.

Q Did they look in your pockets?

A No, they just patted us.

Q Do you know what they were looking for?

A No, I don't, I imagine it was for weapons, and then, we asked—we were asking—

Q Did anyone find any weapons?

A No, they didn't. We were inquiring, everybody calls Officer Payne, everybody around knew they called him Chick Payne, and everybody calls him Chick, so we asked him "What's the trouble, Chick," you know, and he said, "Well, they want to talk to you in North Braddock, they will be out pretty soon."

Q Were you still standing up against the car?

A We were all standing out there and then, after a while—

Q Did they tell you you were under arrest?

A No, they didn't, they just said, North Braddock police wanted to talk to us, and then the North Braddock Police came.

Q Who came from North Braddock?

[fol. 273] A I think Officer Cassidy and Officer Wagner, they came from North Braddock.

Q Was Lieutenant Payne still there?

A Yes, he was still there.

Q Officer Herman?

A Yes, and the other police officer from Swissvale.

Q Who was with Officer Herman?

A Yes, and we were asking everybody "what's the trouble," and nobody said anything, and when the North Braddock Police came, they said—

Q Wait a minute, you did testify, as I understand your testimony, you said that Lieutenant Payne said that the North Braddock Police wanted to see you about something?

A Yes.

Q Go ahead.

A And told us to wait there.

Q You did know it had something to do with something in North Braddock?

A That's when we knew it had something to do with something in North Braddock. So, they asked us if we were in North Braddock, I told them, no, we just came from Homewood then.

Q Did any of the other defendants say anything?

A Everybody was inquiring about what had hap- [fol. 274] pened and everybody was more or less in the dark about why they wanted us.

Q What happened then?

A When North Braddock Police came, they asked Officer Payne if he had searched us, and he told them he had, and then, they proceeded to search my car, they were looking all through my car.

Q They looked through your car?

A Yes.

Q Your car was still in the lot behind Scales?

A Yes, it was still in the lot where I had parked it.

Q You observed this search?

A Yes, I did, in fact, I helped them move tools around in back when they were shining back there, I said, "these are tools, I'll dump them out if you want," and asked them what they were looking for.

Q What kind of tools did you have?

A I had my plastering tools and some other tools that I do jobs with, and I proceeded to help them to search. They looked under the seat and in the dashboard and they were shining the lights and everything.

Q There was testimony to the effect there was some clothing, coats and hats, in the car, is that true?

A I didn't notice any, myself at that time.

Q This is a station wagon, isn't it?

[fol. 275] A Yes, it is.

Q It has two seats up front?

A It is six-passenger.

Q In other words, it has a driver's seat, then, a seat behind that, then, the open deck space?

A Yes.

Q Was this open deck space where you had the construction tools?

A Yes.

Q You better quickly tell us what construction equipment you had there?

A I had my plastering trowel, hawk and straight edge and brick layer tools, and a box with a sorted carpenter tools.

Q Was the back of the car locked?

A No, it wasn't, I never kept it locked.

Q They looked through all these things?

A Yes.

Q Did they take them out of the car?

A No, they were moving them around in there and I was more or less helping them move around when they looked in my box.

Q What box?

A The tool box, I was moving the tools around so they could see.

Q Were you in the car with them?

A I walked over to the car with them when they were looking around.

[fol. 276] Q Were they actually inside the car when they conducted the search?

A Yes, they were inside the car bent down, and looked under the seats and under the dashboard.

Q Their feet were not on the ground then?

A No.

Q Go ahead.

A Then, they took me—they said, "You have to come with us."

Q Before you get to that, was anything found, any of this evidence that is here on the Jury Rail in front of me?

A It was not found.

Q You are certain of that?

A I am positive it was not found.

Q I am referring to these revolvers and referring to this glove, some owner's and operator's cards, ammunition, none of this was found?

A Not at this time.

Q Go ahead.

A They said, "Well, you'll have to come with us to the Police Station."

Q Who said that, someone said that to you personally?

A Yes, they did, Officer Wagner, Lieutenant Wagner.

[fol. 277] Q So, what happened?

A I asked him why, and he asked me, did I know anything about a gasoline station robbery in Braddock, and I told him, no.

Q Did he tell you you were under arrest?

A No, he didn't. So, we got into the police Car and then, they had a conversation and they had a discussion then, they decided that I better bring my car down, so Officer Wagner—Lieutenant Wagner and myself got in my car, and the other officers followed me down to the Braddock Police Station in the Police car.

Q You drove your car?

A Yes, I drove my car, Officer Wagner was beside me.

Q While you were driving, was there anything discussed about the case?

A Yes, he was asking me about a gasoline station and I told him no, and, I said, "Well, I hope I am not implicated in anything." We discussed it all the way down. He said, "If you didn't do anything, you don't have anything to worry about."

Q There was a great deal of testimony in this case, Mr. Lawson, as I am sure you know, concerning what police officers said to you and your co-defendants, and if I recall, Officer Payne said that he made a statement to one of the three fellows, not yourself, or perhaps it was [fol. 278] to all of you, I don't recall, there had been something happened up in North Braddock and he hoped you weren't involved, but if you were, you were in a great deal of trouble.

A I don't remember it word for word, but it was the general conversation.

Q And, as I understood Lieutenant Wagner's testimony, he indicated that he didn't tell you the nature of the charge that was against you; now, you are saying that he did tell you?

A Yes, he did.

Q Now, I am certain that I am correct in my recollection when I remember that he said that when he discussed this with you, you have nothing to say or words to that effect?

A We discussed it from Rankin all the way back to North Braddock, and even after we got back there.

Q Did you deny participation in this?

A I denied it all, I didn't know anything about it, I told him I had just come from Homewood, we had just come from Homewood, and I didn't know anything about it. If it happened, I didn't know anything about it. He said, "Where were you all night," and I explained the situation that I told him in Court today, I explained to him at that time.

Q Was there ever a situation when anyone asked you did you holdup such and such a gas station, and you didn't say anything?

[fol. 279] A No, it wasn't.

Q You always made a reply?

A Yes, I did.

Q And it was always in the negative, that you did not?

A That's right.

Q Lieutenant Wagner was in the passenger side of the car and you were driving the car?

A Yes.

Q And you drove back to the police station in North Braddock?

A Yes.

Q What happened then?

A They took me in this room and Lieutenant Wagner asked me if I had any money, and I told him I did. He asked me "How much do you have?" I said, "I think I have about $32.00 or $33.00."

Q What happened then?

A He said, "Well, you will have to give it to me." I took it out of my wallet and I gave it to him. I counted it out in his hand and it was $31.00, and I had some change, I asked him if I could keep the change for a pack of cigarettes. They gave me a receipt for the $31.00.

Q I show you a copy of a receipt and I direct your attention to the second one from the top of the page and ask you if that's a copy of the receipts he received?

[fol. 280] A Yes, it looks like it.

Q Shows you having received $31.00?

A Yes, I gave them $31.00, and they also took my driver's license and owner's card to my car.

Q They did?

A Yes, they were also in my wallet.

Q They left you keep your change?

A I forgot exactly how much it was, it was forty or fifty cents, something like that.

Q Now, they took from you $31.00?

A Yes.

Q Do you recall anything about the money specifically? I show you some money here that's been referred to previously, in the case, and I ask you to examine it and ask you this question, after you have completed your examination, can you identify any part of that money as yours?

A I cannot look at this and say it is the same money, but I remember having a discussion with the bartender about a two dollar bill that same evening, the previous evening.

Q What was the nature of that discussion?

A He tried to give it to me for change and I told him I did not want it as I testified before, and—

Q You recall where this was?

[fol. 281] A Yes, the bartender was Andy, Mrs. Jones' son-in-law, he was helping out that evening.

Q I may have asked you this question, and I apologize if it is repetitious, do you recall what denomination of currency you had when you last left Scales?

A No, I don't, I don't recall every bill I had or what denomination it was.

THE COURT: Where was this bartender?
A He worked at Scales.

MR. JOHNSON:

Q The Sergeant took the $31.00 and let you keep the change, and what happened then Mr. Lawson?
A They locked me up in the cell.
Q Alone?
A Yes, they did.
Q To your knowledge, was any of the other three defendants in the police station with you?
A No, I hadn't seen any of the other ones; in fact, I didn't see any of the other ones until two days later.
Q So far as you know, you were the only one in this police station?
A That's right.
[fol. 282] Q How long did you stay?
A I stayed there until the aftenoon, that Wednesday afternoon.
Q Was there any discussion that night about the dates after you were placed in the cell?
A Yes, there was, I'd say maybe a half dozen or so people came and looked through the bars at me; in fact, they woke me up, I was sleeping, and they'd have to wake me up and they would come and look. That's the first time I saw Mr.—the gasoline station operator.
Q Mr. Kovacich?
A Yes, that's the first time I saw him.
Q Were you taken out of the cell?
A No, I wasn't, he looked through the bars at me.
Q Were the lights on?
A Yes.
Q Did any of these men identify you in any way?
A No, he was very emphatic when he said "this wasn't one of them, that night," he was very emphatic.
Q Those were the words he used?
A Yes, he said, "No, this isn't one of them."
Q I ask you again, there weren't any other of your co-defendants who were in the same cell block with you?
A No, I didn't see the other ones.

[fol. 283] Q You said other people came in and looked at you?

A Yes, there was about a half dozen different people they brought by there looking in the cell, and I imagine it was for identification purposes, you know, and everybody come by and looked at me.

Q Did any of these people identify you in any way?

A No, they didn't.

Q Did you know any of these people?

A No, I never seen them before.

Q What happened the next morning?

A Well, the next morning, I think the Chief came in and talked with me or took me out, I don't recall whether he took me out of the cell or came in there, and talked with me, and that's when he asked me about—he asked me about a gasoline station robbery and I told him, well, I didn't know anything about it.

Q You are speaking of Mr. Cicco, here the Chief?

A Yes.

Q Go ahead.

A He told me to explain the previous night's activities, and I did just like I did in this Courtroom today, I explained it all to him, and he told me, he didn't show them to me, he told me, you know, they found some guns [fol. 284] and money in the car, and asked me how I could explain that, and I told him if there were guns and money in my car, that I didn't know anything about it.

Q Did he show you these weapons and this glove here and these exhibits?

A No, he didn't. The first time I saw those were at the Preliminary Hearing.

Q He testified, if I recall, that he brought you in and had them on a table or desk or something, and asked you if you knew anything about them.

A No, the Chief was mistaken, he told me about them, and I told him I didn't know anything about it. The first time I saw that stuff was at the Hearing.

Q He told you they came from where?

A He told me that they had found that in the heater vent or vent in my car—no, I think he told me they were found—I was under the impression—I don't know

whether he told me or not, I was under the impression they had found it in my glove compartment.

Q In your glove compartment?

A I was under the impression, I don't know whether he had said heater vent, but I was under the impression he meant my glove compartment.

[fol. 285] Q Did he ever say they found it in the heater vent?

A Yes, that came out at the preliminary Hearing, that's what I understood it was supposed to have been, found in my heater vent.

Q There has been some testimony about the heater vent in your car, are you familiar with this?

A Yes, I am.

Q Would you tell the Court and Jury, or describe it for us the best you can?

A There is a cold air vent on the driver's side, and there is similar—and there is a heater vent on the passenger side, it is a door that, when you pull a lever up, on the dashboard, it closes a little—another door inside this door and that reroutes the heat, that makes the heat come some kind of way, but when you push that in, the cold air comes out of the same vent, and it is about, I'd say, it's about this big, and it couldn't be any more than six inches long. The door is about, I'd say, four or five inches square.

Q When the heater is operating is the door open or closed?

A The door is closed when the heater is operating.

Q When do you have occasion to open it?

A When you want cold air, you would open it, and when you want heat, you would close it and pull this [fol. 286] lever, and it would close another plastic flap door inside of it.

Q Did you have any occasion to open or close this door in or about the time that this alleged robbery took place?

A No, I don't think it was that cold then, I don't think I was operating—I couldn't say for sure, but I don't know whether I was operating the heater at that time.

Q The heater wouldn't work very well if all these things were in it?

A No, in fact, I don't see how all these things would get in the heater vent.

Q You had no knowledge of their being in there?

A No, I did not.

Q And it wasn't until some subsequent time they told you that's where they found these things?

A Yes.

Q You positively say, Mr. Lawson, that you have never seen these things, other than here in this Courthouse?

A I have never saw those things before the preliminary hearing.

Q I will ask you this again, you weren't present when these things, these exhibits were found?

A No, I was not.

Q When Chief Cicco asked you about this, did you make any reply when he asked you if you were involved or any such question?

[fol. 287] A Yes, I replied the same as I am replying today, in as much detail as I know, I told him all the activities that happened the night before, and the same is true with the rest of the officers that asked me about anything.

Q Were you in the habit, Mr. Lawson, of letting anyone else drive your car?

A Well, it wasn't a general habit, but other people have driven it on different occasions.

Q Any of your co-defendants?

A Yes, I believe two of them have driven it at different times.

Q Who are they?

A I think Mr. Ramsey had driven it, and Jackson has driven it.

Q I understand your testimony then, you're say that you are not involved in either of these robberies?

A I was not involved, I had no reason to rob a gasoline station.

Q The money you had on your person was money that lawfully belonged to you?

A I had worked for it, that's right.

Q Mr. Lawson, have you ever been convicted of a previous crime?

A Yes, I have.

Q Would you tell us about it?

A I was convicted of second degree murder.

Q What were the circumstances surrounding that case?

[fol. 288] MR. MEANS: Objection.

MR. JOHNSON: I think that is improper.

THE COURT: We will not go into details or the merits of it, he was convicted, you brought it out, I don't think you have the right to go into the merits of why he was convicted or why not.

(Exception noted.)

MR. JOHNSON:

Q Other than this offense, have you ever been convicted of any other criminal offense?

A No, I haven't.

Q Never?

A Never.

Q Were there any other charges in connection with the Homicide?

A There was charges that went along with it—that were dropped in Court.

Q I am looking at the Indictment here at No. 25 January Sessions 1957, charges of Attempt with Intent to Kill and Assault with Intent to Maim, pointing Deadly Weapons, Carrying Firearms without a License. Were [fol. 289] these part of this other Homicide case?

A Yes, that's the case of the Big Three Motors on Baum Boulevard.

Q They were part of this?

A Yes.

Q You pled Guilty on these?

A Yes, I did.

Q They weren't dropped in Court?

A I thought they were.

Q What you are saying is the Sentence you received is the same Sentence you received on the Homicide?

A Yes, I imagine it was.

THE COURT: Well, let's get the date here. You mean you pled Guilty generally to Homicide and the Judge fixed the degree or the Jury convicted you?

A I pled Guilty generally to Homicide.

THE COURT: When was that, the date?

A May 10, 1956.

MR. MEANS: If the Court please, we have—

[fol. 290] A I mean 1957.

THE COURT: All I want is the date.

MR. MEANS: Under No. 82 February Sessions 1957, in this Court, this defendant pleaded Guilty generally to a count of Murder and Voluntary Manslaughter, and this Plea was entered on May 6, 1967; then, the other one which arose out of the same circumstances was 25 January Sessions 1957, and it arises out of the same case, and that was an indictment charging Attempt with Intent to Kill and Assault with Intent to Maim.

MR. JOHNSON:

Q Now, other than those indictment to which you pleaded Guilty, you have never been convicted of any other crime?

A No, I haven't.

Q Never?

A No.

MR. JOHNSON: You may cross-examine.

[fol. 291]

CROSS EXAMINATION

MR. MEANS:

Q Mr. Lawson, when you left home that afternoon, your wife gave you forty dollars?

A Yes.

Q One of these bills was a twenty dollar bill, you changed a twenty?

A Yes.

Q Was the rest of the forty dollars made up of other denominations or another twenty or what?

A I don't know, I don't recall exactly.

Q Well, you'd remember wouldn't you, if she gave you two twenties or a twenty and smaller bills?

A Probably was two twenties.

Q As I understand it, when you first met the other three defendants in this tavern, was that the afternoon or evening?

A Well, I had seen them first, they were coming in one at a time on different occasions, you know, I'd see one and they'd drift in, more or less, and back out.

Q When?

A Well, I don't know exactly the time, it was in the afternoon, I'd say between one and three, or something like that.

[fol. 292] Q And then, did they go over with you to Homestead?

A No, they didn't.

Q When did you pick them up again?

A When me and my nephew came back to Rankin.

Q Back to Scales?

A Yes.

Q And this was in the evening?

A Yes, it lasted from afternoon until the evening.

Q You were in Scales until what time?

A You mean when we left for good?

Q Yeah.

A It was after dark, I don't know exactly what time it was.

Q Well, was it before ten—I don't want the minute, but some hour, you must be able to place the hour, I take it you thought a lot about this evening getting ready for this trial; do you have any idea?

A Yes, I did, but it was one of those things I didn't think I'd be testifying to at the time.

Q You mean you can't tell us whether it was eight o'clock or ten o'clock or eleven o'clock or anything?

A Well, all I can say, it was after dark because I was aware that the darkness was coming, you know, and if it got dark at nine o'clock, it might have been nine-thirty or ten.

[fol. 293] Q It was shortly, then, after it got dark in May?

A Yes.

Q As I understand your testimony at this point, the four of you got in your car?

A Yes.

Q Which was this light blue station wagon?

A Yes.

Q And your intention was to drive to McKeesport to see your brother, who had something to do with a Paradise Club out there?

A Yes, he mixes drinks out there.

Q Did you drive the car away from Scales?

A Yes, I did.

Q Where did you drive to?

A I drove it down to Braddock Avenue in Braddock.

Q That's where you got the gasoline?

A Yes, I got a dollar's worth of gas.

Q Was it that point someone else took over the car?

A I pulled across the street from the gasoline station, that's when I was aware—

THE COURT: Was that North Braddock?

A No sir, it was Braddock.

[fol. 294] MR. MEANS:

Q You pulled across the street, and what did you do there?

A I got in the back seat and leaned back and went to sleep or closed my eyes.

Q Didn't you tell anyone to take over the car?

A No, I just made the statement, I said, "Somebody's going to have to drive, because I have been drinking too much."

Q They had been drinking quite a bit, too?

A Nobody else said anything about it, I imagine if they would have—

Q You were there, you'd know if they were intoxicated or not?

A I don't know what degree they were intoxicated.

Q You were there and you don't know?

A No.

Q Weren't you there with them?
A Yes, I was.
Q And you can't tell this Jury whether they were intoxicated or not?
A I know I had been drinking, I imagine more than the rest of them.
Q I am not asking you about you, you have testified that; I am asking you whether the others were intoxicated when you decided to turn the wheel over to someone?
[fol. 295] A I couldn't say for sure whether they were intoxicated, I know they had been drinking.
Q Who took over the car?
A I really don't know.
Q Who was in the car when you did this, these other three defendants?
A Yes, they were.
Q Chambers and Jackson and Ramsey?
A That's right.
Q Then, you say you went to sleep?
A Yes.
Q You woke up in East Pittsburgh?
A Yes.
Q A flat tire, is that correct?
A That's right.
Q And you don't know what time elapsed from the time you went to sleep until you woke up?
A No, I don't.
Q And you don't know where you were?
A Well, I know we were coming off the Westinghouse Bridge or close to that.
Q But, you were supposed to be going to McKeesport, right?
A That's right.
[fol. 296] Q You never went to McKeesport?
A I wasn't aware of being in McKeesport, I know I had been asleep.
Q Well, the purpose of going to McKeesport was to go into where your brother is bartender?
A That's right.
Q As far as you know, you never got there?

A That's right.

Q And you don't know where you were then, until you woke up in East Pittsburgh?

A With a flat tire.

Q You don't know what time elapsed?

A No, I don't.

Q So that you are intimating that it was during this time, that this money could have been taken and put in your ventilator?

A No, I am not trying to say that, I am trying to say that—trying to tell what happened that night. If the money was taken, and put into my heater, it is possible that it could have been then at that time.

Q Let me ask you this, did the North Braddock Police treat you all right?

A Yes, except for not giving us anything to eat for long periods.

Q Other than that, they treated you all right?

A Yes.

[fol. 297] Q I take it you don't question the officers' word when they say they found this in your vent?

A Well, I don't question their word, in fact, I don't see why they should say they found it there if they didn't, but I can't see how it would fit in there.

Q Let me ask you this, you remember the officer down in North Braddock—rather East Pittsburgh, who came along when you had the flat tire; you testified that he appeared to think maybe you were doing something you shouldn't, and came up and asked you what was going on?

A No, he didn't come up, he was driving on the street and stopped his car.

Q He spoke to you?

A Yes, he asked—he said, "Are you having trouble," and I said, "No, we are not having trouble, we just had a flat tire."

Q Would you know that Officer again if you saw him?

A I don't know whether I would or not.

MR. MEANS: Will you stand up, please?

MR. MEANS:

Q You see him, is that him?
A I think that's him.
Q Later on, did you find out that you had left a tire [fol. 298] iron in the street there?
MR. JOHNSON: Could we have that Officer's name?
MR. MEANS: He is going to be a witness in a minute. His name is Officer Kovarik from East Pittsburgh.

MR. MEANS:

Q Did you know you left a tire iron laying on the street there in East Pittsburgh?
A Until today, I don't know what happened to my tire iron; this is the first I heard about it.
Q You did leave a tire iron down there, you lost a tire iron that night?
A I don't know whether I lost it, I know I missed one after that.
Q As I understand your testimony, it was after you woke up, then, in East Pittsburgh, the car was bumping?
A Yes.
Q Who was driving then?
A Well, by the time I woke up, everybody was out of the car looking, and we all started grabbing tools, I had to loosen the tire up, it was pretty complicated.
[fol. 299] Q On Direct Examination, I got the impression what woke you up was the car was bumping and this sort of jolted you awake?
A Yes, well, it didn't jolt me wide awake all of a sudden, I imagine I stirred.
Q You can't tell us then who was driving?
A No, I can't.
Q But you got out and helped to fix the tires?
A Yes, everybody was piling out at the same time.
Q When the Officer came along, you're the one that replied to him when he asked what the trouble was, you answered, "We have a flat tire."
A Yes.
Q And then you took over the car?
A Yes, I did.
Q At East Pittsburgh, after the flat tire incident?

A Yes.

Q And you drove it from then on the rest of the evening?

A Yes.

Q And there is no question that after this flat tire incident, that you know everything that happened the rest of the evening, you were driving, you were awake?

A Yes.

Q Now, do you know what time it was in East Pittsburgh?

[fol. 300] A No, I don't, I thought it was getting pretty late, I don't know exactly what time it was.

Q Now, why did you drive, you said you drove to Frankstown Avenue from East Pittsburgh, why did you go over there?

A Well, we got on the 64-Carline and,

Q You were in an automobile?

A Yes.

Q You are still the automobile?

A Yes.

Q Explain why you went to Frankstown Avenue?

A Well, I imagine it was just some place everybody was just in the mood to be, knocking around, you know.

Q What do you mean, by knocking around?

A I mean drinking and just more or less—

Q When you woke up, weren't you surprised you weren't in McKeesport where you started out for?

A (No verbal response.)

Q You started out in McKeesport, where your brother is a bartender, and you woke up, and here you are in East Pittsburgh, didn't you discuss with the other defendants where you were and why you were there instead of up at your brother's place?

A No, I didn't discuss it with them because I figured that I had been asleep, and slept through the whole thing.

[fol. 301] Q You are telling us now you figure you had been to McKeesport, they got out of the car, went into your brother's bar, drank or whatever they were going to do, and come back and go back and you slept through the whole thing?

A Yes.

Q And they hadn't woken you up?
A Yes.
Q It is your brother you were going out to see there?
A No, we were all planning to go out to see him, I don't think that anybody had been out there, to the place where he worked, it had just opened.
Q You are saying now you thought that even though you had been out there and it was your brother, they never bothered to wake you up when you got there, is that what went through your mind?
A Yes.
Q You never asked them whether you had been there, even, or why you were in East Pittsburgh instead of McKeesport?
A Well, I didn't give it too much thought either way.
Q So, now, you find yourself in East Pittsburgh and instead of heading for McKeesport, you go to Frankstown Avenue?
A Well, it seems to me like I'd been sleeping a long time.
Q And where did you go on Frankstown Avenue?
A Well, I think we stopped by the Rose Bar, and a [fol. 302] couple other places out there, I think we stopped by the Rose Bar.
THE COURT: About how far away is Frankstown Avenue, that's out in the East Liberty district?
A Yes, Homewood.
THE COURT: How far away is that from East Pittsburgh where you changed the tire?
A I'll say about three miles the way the carline runs, the way we came.

MR. MEANS:

Q You went to a couple bars out there, did you?
A Yes.
Q The four of you?
A Yes.
Q And then, you all got in your car and where did you go from there?
A Well, we came back out—we came back out Braddock Avenue, and out through Swissvale.

Q This part of Frankstown Avenue is in Homewood?
A Yes, I believe it is considered Homewood or Brushton, I don't know where they meet out there.
[fol. 303] Q It was in the Homewood area, though?
A Yes.
Q You got in the car, and you drove back to Swissvale?
A Yes.
Q That's when the police picked you up?
A That's right.
Q Now, the police officer testified that where they picked you up, down there on Bennett Street, I think is the name of it, that they didn't search the car, they shined the lights through it, and looked through it, and you testified that they actually got in and looked in the glove compartment and all other the seat; are you sure about that?
A I am positive.
Q But, in any event, they didn't find this stuff in the heater at that point?
A No, they didn't.
Q And you are telling us now that you had no idea these two guns, the glove, and Mr. Havicon's cards were in the heater of you car?
A That's right.
Q And you don't know how they got there?
A I don't know how they got there if they were there.
Q Why did you go back to Scales?
[fol. 304] It is now, what, a quarter to one when the police stopped you, is that correct?
A That's right.
Q Why were you heading back to Scales at this hour?
A Well, that's where most of the fellows live and it is more or less a dropping off before I went home, I had to get home, I had to work the next day.
Q You had to work the next day?
A Yes.
Q At that time, did you own a light-colored coat that came above the knee?
A No sir.
Q You did not?

A No sir.

Q Anyone of the fellows have on a green pull-over sweater?

A Yes, I believe Frank Chambers had a green pull-over sweater on that night.

Q Were any of the other defendants wearing a light colored coat?

A No.

Q As has been described here?

A Not as I can recall.

Q Now, look, you were there, were you or weren't you with them all evening?

[fol. 305] A I don't—

Q Not as you can recall, did they or didn't they?

A I can't tell you one way or the other because I don't know whether they were or not.

Q You were with these men most of the afternoon and most of the evening and you can't remember whether one of them had on a coat that's been described here?

THE COURT: I think it's been described here as a light colored trench coat, did you see such a thing in your car there?

A No, sir, I didn't.

THE COURT: You mean you didn't see anybody—any of the four of them have it at any time you were together?

A If they had one, I didn't pay any particular attention to it.

THE COURT: All right.

MR. MEANS:

Q So that, you are in no position to contradict the police officers who testified that he saw such a coat in the car?

A Well, no.

[fol. 306] Q How were you dressed that evening?

A I had jump boots that I work in—

THE COURT: What?

A Jump boots, paratrooper jump boots, I used them for work shoes.

MR. MEANS:

Q What else?

A I had a pair of blue air force heavy woolen pants and I think a plaid shirt and a short lined jacket.

Q Anybody in your crowd have a pair of khaki trousers?

A Yes, I believe.

Q Who had them on?

A I hadn't noticed that, but after we got arrested, we were together for about—well, we were together for about a week before we changed clothes, and I think Frank Chambers had them on, the same clothes he was arrested in that night. Now, you say that while you were in the cell that night, the first night and the morning of the 21st, the police brought down, you said, quite a few people to look at you, is that correct?

A Yes.

Q How many?

[fol. 307] A I don't know, it seemed to me like—well, some of them would be in pairs, some would be together, seemed to me like—

Q They brought Kovacich?

A Yes.

Q And how many others?

A I imagine about three or four, maybe five others,—.

Q Well, there was only one witness to this robbery, wasn't there?

A As far as I know.

Q Kovacich is the only one that saw you people—

MR. JOHNSON: Your Honor, I object to that last question.

THE COURT: Yes, you said the only person who saw "you people"—

MR. MEANS: He said as far as he knows there was only one witness.

THE COURT: The form of the question would be objectionable, "you people." The can say, "saw anyone there," if you want to put it that way.

(Exception noted.)

[fol. 308] MR. MEANS:

Q Well, as far as you know now, there was only one witness to this?

A Yes.

Q Yet, you are saying they brought in five people to see you, see if they could identify you?

A I don't know, I imagine they brought them in for that, I don't know why they brought them.

Q Did you say you don't know where Sixth and Baldridge is in North Braddock?

A I have a general idea.

Q What?

A I have a general idea.

Q Let me ask you this, am I right or wrong, did you not used to work for the man who owned this gas station at one time several years ago?

A I don't know who owns it.

Q Mr. Lucarelli?

A No.

Q Ever work in a gas station in North Braddock?

A No, I never worked in gas station.

Q Ever work up on Sixth Avenue in North Braddock for anyone?

A Yes, I did, I did a plastering job up there for Mrs. [fol. 309] Jones, I believe it is, I plastered and removed wall paper for her. It is up passed Meyer and Powers.

Q You are familiar with North Braddock?

A Well, I am—I wouldn't say I am familiar with it.

THE COURT: Wait a moment, where are you taking that prisoner without asking for permission?

MR. TAMBURO: May I approach side bar?

(An off the recrod discussion was had at side bar.)

THE COURT: We will take a recess. We don't want to conduct this case in his absence.

(A short recess taken.)

RAYMOND LAWSON, resumed the witness stand and testified further as follows:

CROSS EXAMINATION (continued)

MR. MEANS:

Q You testified at one point, Mr. Lawson, that you [fol. 310] were in the tavern, that you were really goofing up the money, what did you mean by that?

THE COURT: You turned your head, I didn't hear it?

Q You testified when you were in the tavern, you were really goofing up the money, recall this?

A Yes.

Q What did you mean by that?

A I meant that I was spending the money that I shouldn't have been.

Q And are you telling us that what with the buying of gasoline in the evening and drinking in the tavern in the afternoon and again in the evening, that you only spent about nine dollars?

A Yes, well, it wasn't steady drinking. They have a minature pool table, we were shooting pool and horsing around generally, then, we would drink in between.

Q Then, you went over to Frankstown and hit a couple places over there and drank some more?

A I didn't drink any, I bought a couple drinks there, but I didn't drink anything.

Q Is it possible that you shoved this stuff in the vent of your car just as the police pulled up behind you and [fol. 311] you saw the police car behind you?

A Are you asking me is it possible?

Q Let me be more direct. Is it true that these guns, some one had them on their person, and this money was in the car, and when you saw the police behind you, you real quick turned down that street and shoved this stuff in the vent, isn't that the way it happened?

A No, I think that would be impossible by the size of the vent and everything, I think it would take more than a few minutes to get the stuff in there, if you can get it in there.

Q You don't question, as I take it, that the police found it in there?

A I don't know, it doesn't seem practical that it could fit in there to me. Now, I had owned the car and I know about the size of the vent, and it goes straight up in the air after it goes in four or five inches, and it just doesn't seem practical.

Q Isn't it a fact that after the flat tire, at East McKeesport, that it was after that, that the four of you drove up North Braddock and two of you went in and knocked off the gas station wasn't it after you had the flat tire?

A That is not a fact.

MR. MEANS: That's all.

[fol. 312] THE COURT: Do gentlemen want to ask any questions?

MR. BLUMENFELD:

Q Mr. Lawson, how old are you?
A Thirty-two years old.
Q How old is Chambers, have any idea?
A I think he is a couple years older than I am.
Q And Ramsey?
A I think he is about my age.
Q Jackson?
A I think he is in his twenties.
Q About twenty-three?
A Yes, I'd say, around there.
Q How long have you known him?
A I have him for a couple years.
Q If I understand what you say correctly, you had done quite a bit of drinking this afternoon and that evening?
A That's right.
Q So much so, that after leaving this tavern in Rankin and going to the Gravity Fill Station in Braddock, you didn't feel that you were capable of driving?
A That's right.

[fol. 313] Q You were that drunk?
A Yes.
Q And tired?
A Yes.

Q And that for some period of time, then, you fell asleep in the back of the car?

A That's right.

Q And then you are not aware of what happened during that period when you were alseep, but when you woke up by reason of this flat tire, is that right?

A That's right.

Q Do you have any doubts then that Mr. Kovacich was robbed?

A No, I don't see why he would come in Court and say he was robbed and he wasn't.

Q But, you don't think this stuff was found in the vent?

A I don't see how it could fit in there, I'll put it that way, I don't see how that could fit in the vent of that car.

Q Isn't it a fact then, Mr. Lawson, that what you are really telling this Jury is that there are one or two possibilities that occurred; that either the police framed everybody and put this stuff in the vent, or else, that while you were sleeping, these other three men robbed the place?

A If you want to boil it down to that.

[fol. 314] Q Isn't that what it amounts to

A Yes, that's what it amounts to.

Q Did you ever find out where the driver, or whoever the driver was of the car while you were asleep, took the car?

A No, I never did.

Q Never even curious about it?

A Yes, I was curious about it.

Q I mean, after all, you were arrested on an armed robbery charge while you were sleeping?

A That's right, and everybody in the car.

MR. JOHNSON: I object to that last question, I ask that counsel restate it.

MR. BLUMENFELD: I will restate it.

MR. BLUMENFELD:

Q We have agreed there are two possibilities, either the police framed you and put the stuff in the vent or else, while you were sleeping, two of these three men went in and robbed the gas station?

A That's right.
Q Those are the possibilities?
A Possibilities, that's right.
[fol. 315] Q So that, somewhere in back of your mind has to be the possibility that while you were sleeping, these three or two out of three, these three tried to rob the gas station?
A That's right.
Q I am asking you, at any time, did you ask any of these men "gee whiz, fellows, while I was sleeping, did you guys really do this?"
A Yes, I did, we had numerous discussions about that.
Q Did you?
A That's right.
Q Who did you discuss it with?
A With everyone of them while we were in jail.
Q Which jail?
A Down at the County Jail and at different precincts.
Q How long were you in North Braddock Jail?
A I stayed in there until Wednesday, around noon, after the robbery.
Q What night was the robbery supposed to have occurred?
A It was on the 21st, Monday night.
Q Monday night, the 21st or 20th?
A Yes, Monday night, because I had went to work that day.
Q Monday night and Tuesday morning?
A Yes.
[fol. 316] Q You were in Jail until Wednesday?
A Yes.
Q And you were in North Braddock Jail with whom?
A Nobody.
Q By yourself?
A Yes.
Q Who did you discuss it with then?
A I didn't discuss it with anybody.
Q I am asking you when the first time was you discussed it with any of these men?

A I think I was pretty upset.

Q I am asking you when the first time was, not how upset you were.

A I am trying to think when it was. The first time they brought us together, I don't know exactly when it was, I think it was for the line-up in North Braddock.

Q I am not asking you what you think, this is something you ought to remember, you were arrested for an Armed Robbery. When is the first time you said to these men "What did you jokers get me into," I'd remember that, don't you?

A I didn't say it in those words.

Q What words did you say?

A I asked them "do any of you guys know anything about some guns or money," and everybody denied knowing anything about it.

[fol. 317] Q But you are not sure exactly when that conversation took place?

A No, I am not sure.

MR. BLUMENFELD: That's all.

MR. LUBOVITZ: No questions.

MR. TAMBURO: No questions.

RE-DIRECT EXAMINATIONS

MR. JOHNSON:

Q Mr. Lawson, I have a few questions remaining. Do you own a raincoat or trenchcoat?

A Yes, I do.

Q Where is it right now?

A The one I own, my wife has in Court, I wore it to Court today.

Q It is in the Courtroom right now?

A Yes, it is.

Q Where is it?

A My wife has it back there.

Q I show you this trench coat and ask you if it is yours?

A Yes, it is.

Q Did you own it on the date of the robbery or alleged robbery of May 20th?

[fol. 318] A Yes, I did.
Q Where was it that night?
A It was at home.
Q It was at home?
A Yes, it was.
Q Step down here a moment, so Mr. Means can see it, would you care to put it on?
Thank you, you can take it off.
Was this in the car that night?
A No, it was not.
Q Did you have a hat on that night?
A I had a work hat, I believe.
Q A work hat?
A Yes.
Q Could you describe it for us?
A It was a cap.
Q Have a bill on it?
A Yes, a work cap, I have two or three I wear, it all depends on the weather. The one I wear now is lighter.
Q Did you have that on when you were arrested?
A I don't remember whether I had it on or not, I never wear a hat unless I am working, and I don't remember whether I had it on or not, because I had been home. Usually when I go home from work, I leave my [fol. 319] cap at home.
Q You don't know whether it was in the car then?
A No, I don't.
Q But, it might have been?
A It is possible, it might have been in the car.
Q Now, I have some questions I want to ask you about this identification that took place. You said the night you were in North Braddock Station some people came in and out and looked at you?
A Yes.
Q One of whom was Mr. Kovacich?
A Yes, he was.
Q And you testified on Direct Examination that he said, "that's not the man," or what were the words?
A He was very emphatic when he said, "that's not one of them."
Q That's not one of them?

A Yes, he was.

Q Was any other police officer present when he said that?

A I believe, if I am not mistaken, Officer—Lieutenant Wagner brought him in to look at me.

Q Now, the next day, or at some subsequent time, there has been testimony there was a line-up, or something of that sort in North Braddock Police Station, and that somebody identified—or Mr. Kovacich identified Mr. [fol. 320] Chambers on that day, is that correct?

A Yes.

Q Tell us about that?

A They put us in a line-up—

Q Just a moment, were there anyone else in the line-up besides you four fellows?

A No, there wasn't.

Q You had on the clothes you had the time this had happened?

A Yes.

Q Go ahead.

A He walked in and he looked at everybody and he said—he looked at Frank Chambers and he said, "he looks like the one that had the blue pistol."

Q He looked like the one who had the blue pistol?

A That's his words, and they asked him to look at the rest of us and asked him if any of the rest of us were the other ones, and he said, no, he said, they weren't.

Q He did say that he wasn't sure about you?

A He looked at us and he said, "no, these—it wasn't them." You know, he was more or less, positive that it wasn't us than he was that it wasn't sure if it was, but he didn't—he looked at Chambers and he said, "he looks [fol. 321] like the one that had the blue pistol."

Q The rest of you, he said that you weren't the ones?

A Yes.

Q Now, what about this identification that took place or this line-up, what ever it was, took place down in McKeesport, when Mr. Havicon came in, tell us about that?

A They took us—

MR. MEANS: I object to that, there is no dispute about that. Havicon testified about six times that he

didn't identify anyone except Chambers, he never identified this man.

MR. JOHNSON: It may be important to this defendant as to what type of identification, if he said, "I am not certain he is the man."

THE COURT: All right, ask him if he looked at him.

MR. JOHNSON: I didn't hear you?

THE COURT: Go ahead and ask him the ques-
[fol. 322] tion, let's get along.

MR. JOHNSON: What was said by Mr. Havicon?

A They had us in the line-up and they brought Havicon, he turned around, shook his head and he said, we weren't the ones and walked away. He said, "They aren't the ones," and turned around and walked away. The police officer grabbed him by the arm, and turned him around and said something, and he shook his head and he said, "I don't want to sent the wrong men to jail," and they took him across the room and sat him down in the chair. While we were standing there, they made us tell our names and if we had ever been arrested before and what for and ages and everything and to turn around so he could look at us, and I think the Chief of Police in McKeesport came in and told them they either had to hurry up because he wanted to go home or something, and they had a Hearing.

Q Was this Mr. Reddington, who testified on Friday?

A Yes, I believe so.

Q And the Chief said he was in a hurry?

A I took it he was the Chief, and then they took us up and had a Hearing and he asked the man to identify somebody, so he looked at Frank Chambers and he said "he looks like one of them," and that's all the identifica-
[fol. 323] tion, that's as far as the line up out there went.

Q Now, just one other question I want to ask you, can you touch or reach this ventilator door that you are talking about, a position behind your steering wheel in your car?

A No, I cannot.

MR. JOHNSON: That's all.

MR. MEANS:

Q You have a pretty good memory for all the details of exactly what Havicon said and how he said it, but you can't even tell us what time it was that you went to sleep or who was driving that car when you woke up on the night of the 20th, you have a very convenient memory, don't you?

MR. JOHNSON: I object to that question, it is argumentative.

THE COURT: Overrule the objection, let's get along.

(Exception noted.)

MR. MEANS: That's all.

[fol. 324] MR. TAMBURO: I have a question.

MR. TAMBURO:

Q You are saying that at the first line-up Havicon could not identify any of the four of you at first?

A He turned away very quickly, he said, "these aren't the ones," and turned away very quickly.

Q Then, after a discussion with the police, he finally identified Chambers?

A Yes.

Q Did Chambers look any different at the time of his arrest than he does today?

A He doesn't look any different to me.

Q Was he wearing glasses then?

A I very seldom see Frank without glasses, because we kid him about his eye-sight all the time.

Q Was he wearing a hat?

A I can't recall whether he was wearing a hat or not.

Q At the second line-up, once again, the only man who was even in any way identified was Chambers, you said that Kovacich looked at Chambers and said, "He looks like the one," did he positively identify him as being the one?

A No, he said, "he looks like the one who had the blue gun."

[fol. 325] Q At that particular point, Chambers was wearing a green pull-over sweater?

A That's right.
MR. TAMBURO: That's all.

MR. MEANS:

Q You have no idea how the blue gun wound up in your ventilator an hour later?
A No, I don't.
MR. JOHNSON: An hour later?
MR. MEANS: The robbery was about a quarter of twelve.
THE COURT: Well, gentlemen, let's get along with the case.

MR. JOHNSON: Your Honor, I would like to have this marked as Defendant's Exhibit A.
THE COURT: What is it?
MR. JOHNSON: A copy of the police receipt for cer-
[fol. 326] tain money involving Raymond Lawson and Frank Chambers. The first receipt and the last one have nothing to do with this case, we are concerned with the second and third receipt.
MR. MEANS: No objection, this is the same think we have shown Lieutenant Wagner earlier.
THE COURT: All right.
MR. JOHNSON: May we approach side bar for a moment?
THE COURT: I'd like to finish this case.
Will you come up and tell me what you want to do, let's get through with the case.

(An off the record discussion was had at side bar.)

ROBERT KENNELLY, a witness called in behalf of Defendant Lawson, being duly sworn, testified as follows:

DIRECT EXAMINATION

[fol. 327] MR. JOHNSON:

Q State your name?
A. Robert Kennelly.

Q Where do you live?
A 2478 Mae Drive, Allison Park.
Q Your occupation, sir?
A Official Court Reporter, in Criminal Court.
Q For this Court here?
A Right.
Q Some time ago, in the early part of this month, did you have occasion to act as Official Court Reporter in the trial of Commonwealth versus Raymond Lawson and others at No. 91 June Sessions 1963?
A I did.
Q And in that capacity, did you take down the transcript of—did you make a transcription of testimony that was given in that proceeding?
A No, I did not.
Q What did you do in regard to that?
A I took the notes of testimony at that proceeding.
Q Is this a verb tim account, sir?
A Yes sir.
MR. MEANS: We will stipulate that he was the re-
[fol. 328] porter, Mr. Kennelly was the reporter and his notes are correct, and we know him very well.
MR. JOHNSON: I would like you to read to the Court and Jury the portion that I referred to with you a moment ago involving prior testimony of the witness Kovacich, Stephen Kovacich.
A Yes sir.
Q Will you read the questions and answers?
THE COURT: We are not going over all his testimony.
MR. JOHNSON: No, just a few lines.
A Question—How much money did they take from the Gulf Gravity Fill Service Station that night?
MR. MEANS: Who is asking the question?
A Mr. Schmitt, Assistant District Attorney.

Answer—The boss estimated, he said about $200.00.

Question—Do you know how much was in the reg-
[fol. 329] ster when you went to work that night?

Answer—I never count the money in the register when I go to to work.

Question—You don't know?
Answer—No.
Question—You have no idea how much money was in the register?
Answer—No.
Question—Do you have any idea approximately the amount of money that was in this envelope up on the shelf you gave these men?
Answer—I didn't have the money in an envelope, I had it the way you have money, you wrap it up, you know, I had it that way.
Question—Do you know how much money was in the roll?
Answer—About $48.00.
Question—Approximately $48.00, that's what you would estimate it?
Answer—Yes.

MR. JOHNSON: That's all.

CROSS EXAMINATION

MR. MEANS:

[fol. 330] Q Let me ask you, have you read over Kovacich's testimony for Mr. Johnson, you have read it over thoroughly?

A Not for Mr. Johnson, no.

Q Have you read it over yourself?

A I have dictated this testimony.

Q Do you recall whether there was any mention of a two dollar bill by Mr. Kovacich in his testimony?

A I believe there was in his testimony, I wouldn't want to say, because someone in the trial mentioned about a two-dollar bill, I believe it was Mr. Lawson.

Q You haven't read Mr. Kovacich's testimony in full?

A No, not recently.

Q You don't know whether he was asked about a two-dollar bill or not?

A I do not know that.

MR. MEANS: It makes it difficult without the records transcribed.

MR. JOHNSON: Counsel will agree to this.

MR. JOHNSON: Your Honor, I rest on behalf of the defendant, Raymond Lawson.

[fol. 331] MR. TAMBURO: On behalf of the defendant, Frank Chambers, we rest.

MR. LEBOVITZ: Your Honor, please, on behalf of the defendant, Henry Ramsey, I would like to call a witness.

THE COURT: All right.

REV. W. M. RAMSEY, a witness called in behalf of defendant Ramsey, being affirmed, testified as follows:

(At side bar.)

MR. LEBOVITZ: Mr. Means wants an offer at side bar. During Mr. Lawson's testimony, his employer testified as to the fact that he was the employer and that Lawson worked for him. Now, this is Rev. Ramsey, the defendant's father and I want him to testify that at the time of the commission of the North Braddock robbery, Henry was working, that's the only reason I want to show that, he is the father and He had knowledge of the kind of work [fol. 322] Henry was doing. We are not going into—his testimony has no bearing on the case, but merely to show that Henry was employed.

THE COURT: For what purpose?

MR. LEBOVITZ: I think it is a very serious crime—

THE COURT: What is the purpose of offering his testimony, to affect what issue in the case, to show he was of good moral character?

MR. LEBOVITZ: We are merely showing the fact—the man is charged with Robbery, he had a job and would be less inclined, that's the only reason.

MR. MEANS: The testimony so far is that Ramsey wasn't found with any money, Ramsey had no money and is not accused of having any money after the robbery.

MR. LEBOVITZ: He is not going to hurt the Commonwealth.

[fol. 333] MR. MEANS: He is going to testify he is a Reverend and he is the boy's father and the boy is a good worker.

THE COURT: If he gets into that, that is putting his character in evidence, then you have the right to prove any record you have against him.

MR. LEBOVITZ: We are just going to show he was the boy's father and the kind of work the boy was doing at this time, that's all;—we are not putting him on for character purposes.

THE COURT: All right.

(End side bar.)

DIRECT EXAMINATION

MR. LEBOVITZ:

Q State your full name, please?
A Reverend W. M. Ramsey.
Q Where do you live?
A 7429 Carey Stret, Swissvale.

[fol. 334] Q Reverend, are you related to any of the parties in this case?
A What;s that?
Q Are you related to any of the—
A Yes, he is my son.
Q Henry Ramsey is your son?
A Yes.
Q Is Henry married?
A Yes, he is.
Q Does he have a family?
A Yes.
Q Where is your church?
A Collingwood Avenue, 2040 Collingwood Avenue, Swissvale.

Q Reverend, getting back to the time of May 20, around that time, do you know whether your son Henry was working or had a job?
A Didn't have a permanent job, just picked up jobs.
Q Picked up jobs?
A Yes, odd jobs.
Q Did you have a job for him, then?
A Yes, I had a job that was pending for the time.
Q Doing what?
A Painting and remodeling some part of the church.
MR. LEBOVICH: That's all.
[fol. 335] MR. MEANS: I have no questions.

MR. LEBOVITZ: We rest.
MR. BLUMENFELD: So far as the defendant Jackson is concerned, we rest.
MR. MEANS: I have some Rebuttal.

LOUIS M. KOVARIK, a witness called in behalf of the Commonwealth, in Rebuttal, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. MEANS:

Q What is your name?
A Louis M. Kovarik.
Q Your occupation?
A Police Officer for East Pittsburgh, seven years.
Q On the evening of May 20, 1963, were you on duty?
A On May 20 at 11:00 o'clock at night, I went to work on the 3rd trick, and Captain Bennett's routine is to take him home every night. We got in the car, and I [fol. 336] was taking him home and dropped him off at the house.
THE COURT: Who?
A Captain Bennett.
Q Did you drive the captain home?
A Yes.
Q And you drove him home at what time?

A Eleven o'clock.
Q Does he live in East Pittsburgh?
A Yes, he lives at 542 Bessemer Avenue.
Q You dropped him off about eleven?
A A couple minutes after.
Q Your Honor, the defendant objects to the testimony as not being proper Rebuttal, has no bearing to the testimony taken.
THE COURT: Overrule the objection.
MR. JOHNSON: It is highly prejudicial.
THE COURT: It didn't appear until the Defense testimony that there was a police Officer had seen them.

(Exception noted.)

[fol. 337] MR. MEANS: I'll do this just to remove any technicality, that in view of the testimony, of the defendant Lawson, we would like to reopen for some direct testimony which will be partly in the nature of Rebuttal and partly very important direct testimony having a bearing on the case.
MR. JOHNSON: We have no objection to proper rebuttal given, but we do object to the Commonwealth being given the opportunity to reopen their case.
THE COURT: Overrule the objection and note an exception.
MR. MEANS: You don't dropped him off at eleven o'clock?
A A couple minutes after eleven, only a couple blocks from the station.
Q The shift changes at eleven?
A Yes sir.
Q Where did you go from there?
A Went over to the intersection, turned around, came [fol. 338] back toward the police station. On the way back, opposite of Captain Bennett, he lives at 539 Bessemer Avenue—
THE COURT: What is this?
A 539 Bessemer Avenue.

MR. MEANS:

Q You saw a car?
A Light blue station wagon.

Q What else?
A Four colored guys in the back of it, so I stopped—
Q You mean inside?
A No, on the outside, in back of the car standing.
Q You were in the Patrol Car?
A Yes sir.
Q In uniform?
A Yes.
Q You stopped and what did you do?
A I asked the fellows "what's going on," and they said they had a flat tire. I said, "Do you need any help, you need a jack or have to go to a gas station?" They said, "everything is okay, Officer," and I took off and went back to the station.
Q Are those four in the room?
[fol. 339] A I can recall two of them from the North Braddock Police Station.
Q Which two?
A Lawson and Chambers.
Q You remember them as being—
A I remember them two over at the police station in the car that I seen.
Q I believe Mr. Lawson recognized you?
A Yes, he talked to me over there.
Q Now, about what time was it you saw these four men in East Pittsburgh?
A Approximately from eleven to eleven fifteen.
Q Later on, did you have occasion to recall seeing four colored men in a light blue station wagon?
A Well, it was only that they had a flat tire, there was found colored guys, then, approximately a half hour to an hour afterwards, we got a call over the radio there was an armed robbery at a gas station over on Sixth Street, so the description of the car came out, and the four colored guys, so I went back to the spot where this here car was sitting with the four colored guys—
Q When you heard the description later on the police radio, did this remind you that you had seen four colored fellows?
A Yes.

[fol. 340] Q You went back to where you had seen them?

A Yes, I found a tire iron there.

Q What did you do with the tire iron?

A Put it in the police car and Officer George that worked with me, I told them about it, about the four colored guys I saw and the station wagon, and it fits the description. Approximately an hour after that, we got a call they were apprehended down in Swissvale, so Officer George and I went to North Braddock, they had the station wagon up by the police station. I walked inside with the tire iron and, Lawson, I asked him, "you just had a flat tire in East Pittsburgh," and he said, "yeah, I forgot my tire iron, I left it lay over there."

THE COURT: What?

A The tire iron, they left it lay over there where they had the flat tire.

MR. MEANS:

Q You actually brought this in and took it over and showed it to Lawson?

A Yes, and there was different Officers in there.

Q This was over at the North Braddock Police Station?

A Yes, and Lawson identified that as his, he said [fol. 341] he forgot it over at the spot they had the flat tire, and then, Lieutenant Wagner, Officer Cassidy and I left the two boys in the station with the desk Sergeant, we went outside and searched the car. Lieutenant Wagner found a light colored trench coat in the back of the car.

THE COURT: I think this is definitely what you should have brought out in Chief, you had the other officers testify to that.

MR. MEANS:

Q Let me ask you one question, did you see the trench coat that Lawson put on?

A Yes, I saw it.

Q Was the one you saw in the car similar to that?

A Yes, light-colored, it was in the back seat.

MR. MEANS: That's all.

MR. JOHNSON: Your honor, the defendant again renews his objection to this witness's testimony and ask it be stricken from the record and the Jury asked to disregard the same.

THE COURT: Motion refused, allow an except-
[fol. 342] tion.

CROSS EXAMINATION

MR. JOHNSON:

Q Now, you say this incident involving the boys in the car and the tire being changed took place between eleven P.M. and 11:15 that night?

A Yes sir.

Q How do you know that?

A I started to work at 11:00 o'clock.

Q It didn't happen at 11:00 then?

A Between 11:00 and 11:15.

Q It didn't happen at 11:00, did it?

A No.

Q Was Captain Bennett in the car with you?

A No sir.

Q Now, you say it was a detail for your shift to take Captain Bennett home?

A Yes, it is routine.

Q Where does he live?

A 542 Bessemer Avenue.

Q Where is that?

A Opposite where the car was parked.

[fol. 343] Q On that street?

A On Bessemer Avenue, same street.

Q You had taken him home?

A Yes sir.

Q He had gone in his home?

A Yes sir.

Q What time do you come to work?

A 11:00 o'clock, about a couple minutes to eleven.

Q How far is it from the police station to the Captain's home?

A Two blocks at most.

Q Two blocks?

A From the police station to his home, he rides up there every night, it is uphill.

Q What you are saying then, is, sometime after 11:00 o'clock?

A Yes, between 11:00 and 11:15.

Q Why do you say 11:15?

A Well, how long does it take to drop him off, go over the street and come back?

Q I don't know, I wasn't there, I am asking you.

A Between 11:00 and 11:15 this car was parked at 539 Bessemer Avenue with four colored fellows on the outside standing in back of the car.

Q Did you take him home promptly at 11:00 o'clock?

[fol. 344] A Yes, it is routine every night.

Q You didn't make any official note as part of your records or anything what time you took him home?

A No.

Q Ever have occasion to take him home a little later?

A No sir.

Q You take him home?

A I have been on there seven years.

Q Always take him home?

A We have a routine there, we change shifts and he goes home, no earlier, no later. If the guys are all there before 11:00, he stays until 11:00.

Q Isn't it true, officer, this could have happened forty-five minutes later?

A No sir.

Q It's only your recollection, though, isn't it?

A I am sure of what I said.

Q Is it only your recollection?

A Yes.

Q You didn't write it down?

A No sir.

Q. And the time it happened, you didn't think it was significant' did you?

[fol. 345] A No sir.

Q So, you didn't make any note of it?

A No sir.

Q Did you see a flat tire?
A No sir.
Q You didn't see a flat tire?
A It was dark, you couldn't tell, it was in a dark spot, there was no street light.
Q You say the boys were all out of the car?
A Yes, all four of them standing in back of the car, the back end of it.
Q Could you tell what they were doing?
A No sir, they were just standing there when I came by, that's why I stopped, I thought they were going to mess around. I didn't check them down for owner's cards.
Q No reason to?
A No.
Q Did you look in the car?
A No, sir, didn't get out of the police car, just asked them questions, they said it was a flat tire; by the looks of the car, everything looked okay.
Q You drove off?
A Yes sir.
[fol. 346] MR. JOHNSON: I have no other questions.
MR. LEBOVITZ: Nothing.
MR. TAMBURO: Nothing
MR. BLUMENFELD: Nothing.

MR. MEANS: No further Rebuttal.
MR. JOHNSON: Your Honor, we have some Motions to make.
THE COURT: Do you want to offer any further evidence in contradiction by your defendant here of what this witness said?
MR. JOHNSON: We will recall the defendant Lawson for a few moments.
THE COURT: All right.

RAYMOND LAWSON, a defendant, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION

[fol. 347] MR. JOHNSON:

Q Mr. Lawson, you are still under oath. You heard the testimony given by this police officer a moment ago?

A Yes, I did.

Q Do you wish to contradict it in any way, now is your opportunity to do so?

A Well, I don't remember about him bringing the tire iron down to the station.

THE COURT: What?

A I don't remember him bringing the tire iron down to the station later. He might have come down, like I said, a lot of people did come down for identification.

Q Did you lose a tire iron?

A I missed my tire iron, but it was some time after, I never did know until today what happened to it.

Q The other contradictions?

A (No verbal response.)

Q Did it happen any way other than the way he testified?

A Well, I can't say that they happened any differently.

Q What about the time, Mr. Lawson?

A Well, I wasn't sure of the time, myself, so I can't say that he was saying anything wrong about the time, [fol. 348] I don't know exactly what time it was myself.

Q But, from the time you were in East Pittsburgh, if I understood your Direct testimony, the time you were in East Pittsburgh and this incident with the tire until you were arrested behind Scales Tavern, you were driving the car?

A I was in control of the car.

Q Wholly aware of what was going on?

A That's correct.

Q And no robbery took place?

A No sir, no robbery took place between that time and the time we were picked up.

Q Do you carry a watch?

A No, I didn't have any on at that time.

Q Was there a watch in the car?
A No, there isn't.
Q You don't know what time this business occurred?
A No, I don't, I really don't know what time it occurred.
MR. JOHNSON: That's all.
MR. MEANS: Nothing.

THE COURT: EVERYBODY Rest?
[fol. 349] MR. JOHNSON: We rest.
THE COURT: We will not close the case today, but we will excuse the Jury until tomorrow morning.

(Jury excused.)

THE COURT: What are your motions?
MR. JOHNSON: Your Honor, on behalf of the defendant, Raymond Lawson, we respectfully petition this Court at this time to direct a verdict in his favor as to the two indictments involving robbery and receiving stolen goods at No. 78 June Sessions 1963 and 91 June, 1963.

(Argument on the Motion.)

THE COURT: Motion for directed verdict is refused and allow an exception, and you gentlemen can make the same motions and be refused, so, you will be fully protected; if I am wrong, in the event of a conviction, you will be fully protected. I have concluded that it is [fol. 350] the proper thing to do here, so there is not much use in wasting time on it. I have been thinking about this a great deal.
MR. BLUMENFELD: My only question is, just raising the motion and refusing it, are we protected even though the reasons are not mentioned?
THE COURT: I never take advantage of that. You make a motion for a directed verdict and you would be protected for anything you raise here as to why the case should not be submitted to the Jury. There is not sufficient evidence to submit it, is that your position?

MR. BLUMENFELD: I was going to raise the point that even if my defendant knew a robbery was taking place prior and afterwards, but did nothing but sit in the car, and did not act it any way or participate in the [fol. 351] robbery, but had full knowledge it was going to take place, and when it was over, had full knowledge it had taken place, even under those circumstances, the mere fact that he had nothing to do with it might still render him in a position of a directed verdict.

THE COURT: Naturally, I will have to tell the Jury they must have known there was a robbery perpetrated, must have participated in it to some extent, either by way of watching or taking actual part in it, but they must have known about it.

MR. LEBOVITZ: I want to take one moment to put on the record on behalf of the defendant Henry Ramsey at No. 91 June Sessions 1963, the North Braddock robbery, I respectfully ask the Court to direct a verdict of not guilty as to Henry Ramsey.

(Argument on the Motion.)

MR. TAMBURO: May I also in behalf of Frank [fol. 352] Chambers at No. 79 Sessions 1963 move for a directed verdict for the same reason already brought forward as to the other defendants, and at No. 91 June Sessions 1963, I move for a directed verdict for the same reason that have been brought forward, and also because the search warrant was defective, making the evidence that was put in completely inadmissible, and I say all the evidence should be kept out on that basis. I also ask for a directed verdict.

THE COURT: All right, refuse the motions and allow exceptions.

(Court recessed at 3:30 P.M.)

[fol. 353]

Pittsburgh, Pa,
October 2, 1963.

COURT opened at 10:10 A.M.

(An off the record discussion was had at side bar.)

THE COURT: You may proceed to the Jury, Mr. Johnson.

MR. JOHNSON closes to the Jury in behalf of defendant Lawson.

MR. MEANS: I object to the accusation of counsel that the District Attorney is falsifying the evidence. I resent it, Mr. Johnson.

THE COURT: Is that your statement to this Jury that the District Attorney is falsifying the evidence?

MR. JOHNSON: Yes, Your Honor.

THE COURT: All right, if that's your statement and you wish to argue that to this Jury, go right ahead, I [fol. 354] will have something to say about that to the Jury.

MR. JOHNSON resumes closing to the Jury in behalf of the defendant Lawson.

MR. LEBOVITZ closes to the Jury in behalf of defendant Ramsey.

MR. BLUMENFELD closes to the Jury in behalf of defendant Jackson.

MR. TAMBURO closes to the Jury in behalf of defendant Chambers.

MR. MEANS closes to the Jury in behalf of the Commonwealth.

(COurt recessed at 11:50 A.M.)

[fol. 355] ORAL CHARGE OF THE COURT

Graff, Judge
Vodde, Reporter

(All defendants and counsel present in Open Court.)

MEMBERS OF THE JURY:

You have been sworn to try two cases, and in the first case, at No. 78 June Sessions 1963 in the Court of Oyer and Terminer of Allegheny County, these two defendants, Frank Chambers and Raymond Lawson, stand indicted before you charged with having committed a crime known as Armed Robbery in the first charge or count in that indictment, and then, the second charge or count, they are charged with what is known as Receiving Stolen Goods.

Robbery is defined to be the felonious taking of personal property from the person of another or from his presence by the use of violence, intimidation or putting in fear, and when a robbery occurs by the use of a deadly weapon, such as, contended in this case, it is known as Armed Robbery, a more serious kind of robbery. So, the charge of the Commonwealth is that these two defendants [fol. 356] here, Lawson and Chambers, acting with a common purpose and design, acting together, did, on the early morning of May 13th of this year, enter a gas station in the City of McKeesport at Fifth and Lysle Boulevard, and there, by the use of revolvers, deadly weapons, did take, feloniously take certain money from a man named Havicon, who was the attendant there. If they did so, they are Guilty of Armed Robbery. The second count is what is known as Receiving Stolen Goods, and that briefly is where anyone receives into his possession any personal property which has been stolen, knowing it was stolen or under such circumstances that he reasonably must have known it was stolen, received it in his possession, is Guilty of what we call Receiving Stolen Goods.

So, in the first case here, we have these two defendants now; there were originally these two other defendants, Jackson and Ramsey included, but as you heard at the

conclusion of that case, I sustained what is known as a demurrer to the other two defendants because I didn't feel there was sufficient evidence to convict them, that is, Ramsey and Jackson, on this first charge here, the first indictment.

Then, we have next a charge here against all four of these defendants, Chambers, Lawson, Jackson and Ramsey, they are all charged here in the second indictment [fol. 357] at No. 91 June Sessions 1963, in the Court of Oyer and Terminer of this County, they are charged there with on the 20th of May commiting an Armed Robbery in that they went into the Borough of North Braddock and there the four of them, acting together with a common purpose and design, in one capacity or another, engaged in an Armed Robbery, and I have just defined what Armed Robbery is, in that they, by the use of deadly weapons, at least two of them, by the use of deadly weapons and the others knowing of it and joining in it in some manner which I will indicate to you in a moment, joining together with a common purpose and design, that they went there for the purpose of committing a robbery, and that they actually did commit the robbery, and that two of them went in armed with deadly weapons and took certain money away from a man named Kovacich. Now, that is the first count in that indictment, Armed Robbery, and the charge is that while the Commonwealth contends only two of them went in there, actually in the filling station, yet, that the other two were in this car, knew it was going to be done, they were out there waiting near by, within a block, acting as lookouts, watching if anybody would come, and thus joined in it, knowing it was being done and actually went there for the purpose of having two of their numbers commit an Armed Robbery, and I say to you, Members of the Jury, [fol. 358] in either of these cases, it wouldn't make any difference whether the person was actually on the scene armed with weapons in hand, to convict; if you think they were joined together, acting with a common purpose and design, everyone of them would be equally guilty for the actions of the other. Now, in the second count in that indictment, again, we have Receiving Stolen Goods, and I defined that to you.

Let's consider the evidence here upon the first case. Before I come to that, let me state to you that these cases were directed to be tried together. They are separate offenses, but Judge Legnard, the Presiding Judge, directed they be tried here before the same Jury, and as the cases developed, it is for this reason that the evidence, a material part of the evidence in each case would be evidence in the other case, and furthermore, I assume that the Judge felt they are so closely connected, it would indicate allegedly the same persons or at least two of the same persons, are in each one, it showed a course of conduct which would bring—being so closely connected in the place that it happened and also the time, it would indicate a course of conduct, and, under those circumstances, it is proper to try cases together, but it was, as I say, particularly tried together because the evidence, a material part of the evidence, would be evidence in [fol. 359] each of these cases. At any rate, we have them tried together and I will say to you, however, that evidence introduced upon this first case, that's the one in McKeesport, should not be considered as any evidence against Ramsey or Jackson, because they are out of that case, and that evidence offered in that case is not evidence in any sense against Jackson or Ramsey, and you will bear that in mind in your consideration of these cases.

Well, now, let's come to the evidence here, the position of the Commonwealth. Let's consider the McKeesport case, first. You have this man, Havicon, testifying that he was on duty, he was the attendant there at this Boron Station, I believe that's the Ohio Oil Company, a station on Fifth and Lysle Boulevard in the City of McKeesport, and between 2:20 and 2:30 in the morning, he heard footsteps and he noticed—at least, he said there were two colored men there. He said he didn't get a good look at the one, he was behind him most of the time. At any rate, there was one in front of him, and he said he drew a gun, and that gun was a sort of nickel or chrome colored gun, a .38. He was a former police officer, Havicon was, and he said he knows the caliber of guns and it was a .38 caliber. He said this man, the one man was in front of him, he got a good look at him. He told him

[fol. 360] to give him his money, they ordered him to take his trousers off, he did take them off, and he found them later in a room. He said his wallet was taken. He tells you that some money was taken out of the safe and taken out of the register, as I recall, something around $70.00 if I remember correctly. At any rate, they got the money and they left. Now, he tells you that one of these men had khaki trousers on, had a mustache, his hair was a little bit longer than the one whom he identified in Court as being there, but he said he got a good look at him, he was in front of him. He didn't have a hat on, as I recall. The other man, he said, he couldn't see, but he did get a good look at the other one. So then, we have these two men going, and that's all that happened that night. It was reported to the police, but then, a week later, on May 20th, the Commonwealth's evidence shows there was another Armed Robbery took place out in that area, this would be in North Braddock, and there was apprehended in a car, which is alleged to have been used—alleged by the Commonwealth to be used in that robbery, a blue station wagon. They were taken into custody, four men, these four defendants here, that includes Chambers, and Lawson. The car, according to Lawson's own testimony, was his, that is, this one de-
[fol. 361] fendant, he owned that car. These men were in it, according to the Commonwealth's evidence, and also to Lawson's testimony, in that area. After these men, these four men were taken to various police stations and the car taken to North Braddock Police Station, there was found, according to the Commonwealth's evidence, Lieutenant Wagner and Mr. Cassidy, who are on the Police Force out there, they tell you they searched the car—the other officer said they searched the car at the place of apprehension in Rankin, they flashed the light around but they didn't see anything there, and I believe, looked it over after they came back to North Braddock Police Station, but they went out again to look at it, and Cassidy and Lieutenant Wagner tell you that they went out there, there was sort of a door or vent under the dashboard, and pulled it open, and there was some things found, which are proper evidence in the case, and among

these things which were found there were four cards, which had the name of this man, Havicon, on, driver's license, owner's card, and some club card. They have been offered in evidence, and he identified them as being his cards, and he said the people who he said were robbers took those cards from his wallet at the time of the hold-up in McKeesport, he identified them as being his. They were in this car which was owned by Lawson, he tells you it was his car.

[fol. 362] So, after this happened, these men were in the police station, Mr. Havicon was called to come there and look at them. He tells you that he picked out—immediately picked out Chambers as being the man who had the gun and was in front of him. He tells you here he is positive, in Court, that he is positive. That is a matter of identification, Members of the Jury, and in passing upon a matter of identification, of course, it is a matter of opinion, and, of course, immediately it comes into your mind, did he know this man before; he did not; what was the opportunity he had to look at him, were there any characteristics about him which he would remember him by, how long did he look at him, how was he dressed. Well, of course, he said—Havicon said he had a sort of beige coat on, khaki trousers, he didn't have a hat, he had a mustache, didn't wear glasses, gave you his height about five feet ten, I think. So, he tells you here in Court, this man Chambers is the one who had the gun there. He tells you that he didn't hesitate, and the officers who testified concerning it, when he went into the station to look at these four men, he didn't hesitate at all, he picked Chambers out there without hesitation as being the man, identified him there.

Now, the Supreme Court has this to say about iden-
[fol. 363] tification evidence. Where the opportunity for positive identification is good and the witness is positive in his identification, and the identification is not weakened by prior failure to identify, but remains even after cross examination positive and unqualified, the testimony as to identification need not be received with caution. Indeed, the cases say that positive testimony as to identity may be treated as a statement of fact. On the other

hand, where the witnesses is not in a position to clearly observe the assailant or not positive as to identity or his positive statement as to identity are weakened by prior qualification or failure to identify the defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the Jury that identity should be received with caution. I am leaving it with you, that is what the Supreme Court says about the matter of identification, and all these matters are for you, and I have given you there what the Supreme Court has said, when it should be received with caution or when it need not be received with caution, but I have indicated to you the circumstances, as I recall them, under which this man Havicon said he was able to identify Chambers.

So, we have direct evidence there, and direct evidence [fol. 364] is this, if somebody testifies what he saw, what he heard, what he knows of his own knowledge, a direct statement of existing facts. Now, as to the other defendant in the case, we have known what is known as circumstantial evidence, that is, as to Lawson. Circumstantial evidence is simply this: there are a set of circumstances, facts which the Commonwealth attempts to prove or which they prove or must prove, and, you infer from those facts the existence of other facts. It is an inference which is drawn from other facts. A person just can't come in and lay their hand on it and say, "Yes, I saw this," but they testify as to circumstances from which the Commonwealth asks you to conclude and infer that the defendant was Guilty. Now, as to circumstantial evidence, this is the Law with reference to circumstantial evidence. Circumstantial evidence, in order to justify a guilty verdict must be such as reasonably and naturally justifies an inference, an inference, a conclusion, as to the guilt of the accused, and be of such volume and quality as to overcome the presumption of innocence and satisfy the Jury of the accused's guilt beyond a reasonable doubt. In other words, it must be such that would naturally lead to the conclusion sought by the Commonwealth, the inference as to guilt.

What do we have here as to Lawson on this? We have [fol. 365] first the direct evidence on the first case as to Chambers plus the identification; we have the evidence first that there was a robbery committed, and you must find first that there was a robbery. If there was a robbery, who did it? You have here Havicon saying Chambers is one of the men there, there was another colored man there. Now, we have this circumstantial evidence about a week later, this man's cards, Havicon's cards, which he said were taken from him that night, found in Lawson's car; also in that car was this man, Chambers, too. The Commonwealth asks you to believe from that here is the possession of stolen property, which was stolen in the robbery, and asks you to conclude that Lawson must have been the other man who was there at the time the robbery was committed, provided, of course, you find that it was committed.

Well, now, so much for that case, let's come to the next case, and here on May 20, that would be a Monday, May 20 of this year, the Commonwealth's evidence is to this effect, that out in the Borough of North Braddock, there was another Armed Robbery at a Gulf Station there on Sixth Street and Baldridge, I think, and it was about a block away from a Kroger Parking Lot. Here, again, Members of the Jury, the evidence here is circumstantial as to all these defendants, we have four de- [fol. 366] fendants in this case, it is all circumstantial evidence. When I talk of circumstantial evidence, that does not mean you are not to believe it, because certainly you have cases that are stronger on circumstantial evidence than what we call direct evidence.—The believability of this is for you, and the conclusion which you come to and the inferences which you draw from the circumstances the Commonwealth proves is for you to decide.

What do we have here? Well, around after eleven o'clock we have Jerry and Linda, they are two youngsters out there, between 11:00 and 12:00 o'clock. Linda, I believe, lives on Sixth Street, she said that they had taken her mother over to a girlfriend's and they went over to get her, and on their way back, why, they came

through this Kroger Parking Lot. Now, this would be between 11:00 and 12:00 o'clock. She tells you and Jerry tells you that they observed a car, a blue station wagon, in which there were four colored men. She noticed them, and these young people both tell you that car, they had noticed it circling this block where this Gulf Station was and the Kroger store was, five or six times, they say, it attracted their attention. Then, she said—at least one of them said, that when they went by the car, they [fol. 367] noticed one of them had a green pull-over sweater on and they noticed a brown trench coat on one of them. Then, they went to Linda's home, and when they were there, they observed this car pulling out of the Parking Lot fast, the boy said going 45 to 50 miles an hour, towards Braddock. Then, just a few seconds or so after that, they heard the call, either from the man in the Esso Station or the Gulf Station that a Robbery had been committed. This was all before, as I recall it, before twelve o'clock. Then, the police came and they told the police what they had seen and heard, consequently they were in here as witnesses.

The Commonwealth says from this evidence, that here this car was observed, four colored men in it, a light blue station wagon and pulling out fast from this lot just before the cry came that the robbery was committed and speeding away. Then, you have the testimony of the officers who came there, they immediately put out on their radio to other cars the fact that a robbery had been committed and giving them all the information they could.

Then, we have the testimony of two other officers, they over near Rankin, coming in toward Rankin, both of them were following this blue car. Then, they followed it and went across the bridge, as I recall, in Rankin—if [fol. 368] I am wrong on my recollection, you correct me—turned off a street went in the parking lot, and they both went down there and these four defendants were in that car. They ordered them out and had them stand up and patted them down, and found no weapons. Then they took them into custody and then Lieutenant Payne came from the Rankin Police Station, he knew all these

men, apparently lived over there, or at least some of them, in Rankin. So, at any rate, they were taken to different stations and Lawson drove his own car, with one of the officers in it, maybe it was Wagner, over to North Braddock Police Station. The officers, as I mentioned a moment ago, said they flashed their light around in there, didn't see anything in the car, but these men were searched and, as I recall the evidence, there was found on Chambers $46.00 and on Lawson, $31.00, and he had a two-dollar bill on him. He admits that, and $9.00 on Jackson, nothing on Ramsey. Well, the evidence of the Commonwealth is that after they went to North Braddock Police Station, they again looked around, found nothing, then you have this evidence that I commented upon a moment ago, that Cassidy and Wagner went out and to make a further search of the car and opened up this vent and then they found, not only the cards which I have previously mentioned, but they found two guns, one was a metal gun, a .38 chrome or nickel gun, and [fol. 369] another .38 and a glove with a lot of change in it, which has been offered in evidence here. Now, this young man here, the attendant, said that when they came in there and held him up, they not only took the money, and there had been some confusion as to just how much was taken, but at any rate, they did take the cash there, the change, and put it into a glove, which he had, and he identifies that as being his glove which was found in the car, so we have the finding of these articles the personal property, the two guns, the cards and the change in the glove, which Kovacich said was his, and the Commonwealth says to you that here are the guns which were used, because he says they were similar, looked like the guns which were used. Of course, he didn't identify them positively, this would be impossible, he said it looked like them, but he said he does positively identify the glove and the change which he said was taken.

There you have the finding, within a short period after the robbery, of some change in a glove, which the person who was robbed, said was taken, and you also have these two guns which would fit into the picture as he described it as being used there, and also these

cards, which the Commonwealth says were taken on the other robbery.

This man Kovacich wasn't able to identify any of these [fol. 370] four men as being there at the time this occurred, the hold-up or the robbery. He did, however, at first identify Chambers, but then, he said he is not sure and he is not going to tell you that he is sure here. He identified him in the police station, but he said he just didn't like to so testify before you. At any rate, he told you, I believe, that one of these men had on a green pull-over sweater, and there was a trench coat on one of them, and Chambers, when he was arrested, did have a pull-over sweater, a green one, and there was also a trench-coat or light brown coat in the car. So, you have that bit of evidence, Members of the Jury.

Now, this happened, according to the Commonwealth's evidence, between 11:00 and 12:00 o'clock, Kovacich said about 11:45 it happened. You have the other testimony here, Members of the Jury, as to—well, I'll mention that in a moment. Chief Cicco said you couldn't see the Gulf Station from the Kroger lot, and he said both of these guns were loaded. Then, we had the testimony of the search being made by Heverly, he seached Chambers' home after this happened, the same day, and he found a box of .38 short shells, which would be used in this one gun, the .38 short gun, and then he found 42 long shells and three short cartridges loose there. We admitted that in evidence as a circumstance, Members [fol. 371] of the Jury, for your consideration in this case. You have this car, at least inferentially identified as circling this place four or five or six times, pulling away fast, then the cry that a robbery is committed, the picking up of them not too long afterwards, the following of it by two officers, I think perhaps it was within the hour, you will remember that, and apprehending these men in Rankin, finding of articles there which have been identified, the change in the glove, the cards, the shells, the guns, and the identification as to clothing. The Commonwealth says to you that you should properly come to the conclusion that these men, all of them, had planned this thing, were working together with a com-

mon purpose and design, and they went there, circled this service station, parked there, and, at least two of them went in, and the others remained there as look-outs to help warn if anybody was coming along, therefore, joined in, and they would be equally guilty, if they did. Then, of course, that this car belonged to Lawson, it was his car, according to his evidence. The Commonwealth says to you, that you should convict all four of them.

The evidence, I will frankly state to you, is somewhat weaker as to—is not quite as strong as to Jackson [fol. 372] and Ramsey as it is to the others, because you do have the car being that of Lawson, and it was his car, and also the other evidence there is somewhat stronger as to Chambers, however, it is all a matter for you.

Now, let's come to the defense in this case, Members of the Jury. In the first case, Mr. Lawson takes the stand, that is the one that happened on May 13, he denies any knowledge of it at all. He knows these people, as a matter of fact, all four of them were out together, and Mrs. Jones said they came in her saloon over in Rankin. They knew each other, according to Lawson's evidence, they were in there on this particular day, but to come back to the first case, he wasn't there at all, he knows Chambers, but he wasn't with him. He wasn't in McKeesport at all, and he introduces here in support of his denial of being there at all what is called an alibi. In other words, he said he was some place else at the time this happened, he was at a drive-in theater with his wife, and she took the stand to corroborate him, and he told you that at the time—you see this happened after two o'clock in the morning—she said that at that time they had gone to the drive-in theater, taken their children, and they were there and not in this McKeesport robbery, if there was one. They came home after that and went to bed. So, [fol. 373] you not only have his denial of being there, but you have his wife offering her testimony supporting his contention that he was some place else. All of this evidence, of course, is proper for your consideration in determining whether he is guilty or not, because if he denies it, said he was some place else, and that his wife corroborates him in that respect.

Now, coming to the other case, he said on this May 20, it was a Monday, he tells you he had been working, he worked for this man who came in from Monroeville, and testified for him, and he said he was working perhaps on that day, but perhaps it was raining and he left, but he said in that connection, as to having money, his wife said she gave him $40.00 on this day to go over to see a nephew to get a card to use to buy paint for the home. She told you that she gave him $40.00 and that was to account for this $31.00 which was on him, I mean, that would be a method of accounting for it. It doesn't mean he couldn't have gotten it any other legitimate way, but she tells you she gave him this money and this man he worked for said he paid him, I believe, on the Friday before, he made about $98.00, I think it was. Now, coming back to the second case here, that's the one we are talking about now, he said that he went over there to [fol. 374] see the nephew and found the nephew and they had a few drinks, and finally, he ended up over in Scales place, Mrs. Jones' place in Rankin, and were drinking there, and drinking with these other three defendants, and Mrs. Jones said that's right, they were drinking there, they were drinking there that afternoon and then, as I recall it, they left there and came back, and it was in the evening, later in the evening, Lawson said they left and they were going over to see his brother in McKeesport at a place called the Paradise Club. Lawson said he was feeling pretty good, he had had perhaps a little too much to drink, but wasn't intoxicated, and on the way over, they stopped at a Service Station, a Gravity Fill Station, to get a dollar's worth of gas. He was driving at that time, and at that time, he told somebody else to drive, that he was sleepy. He wanted one of the other three to drive, he doesn't know who it was or can't tell you who it was. He said he got in the back seat and went to sleep and doesn't remember anything until there was a bump, and this was in East Pittsburgh, a bump, and he was awakened there, there was a flat tire. He said they all got out there, and changed the tire, and then he said, from there on, he got in the car and he drove it, and he drove it out to the Homewood district and Franks-

town Avenue and was on his way back to Rankin to deliver the men when the police apprehended him. In [fol. 375] other words, he said he wasn't near this place at all, and as I understand his position, if it was committed by the other three and these things put in his car, he knew nothing about that, they must have done it when he was sleeping. If that is true, of course, you can't convict him, or, as you heard him say before, he blames the police for framing him, for putting these articles in there, a frame-up, he said either that or the way they got in his automobile was one of the others or perhaps the other three put them in there when he was sleeping, but he denies taking any part in this at all, and that applies to both cases. In the other case, as I have commented upon, he said it is his car, he didn't have anything to do with it at all.

Now, the gas attendant there, mentioned about having a two-dollar bill and he wanted to get rid of it because it was bad luck. There was a two-dollar bill in Lawson's possession, as the officers tell you when they searched him, but Lawson tells you he got that in change, from a bartender, it wasn't from any money that was taken from any robbery. So, he just simply says to you, he had nothing whatsoever to do with either of these robberies, if you conclude there were robberies committed.

Now, as to Ramsey, of course, his father took the stand and said he is a preacher, and that is about all he [fol. 376] testified to, he said the boy is twenty-three.

Now, as to Lawson, he introduced it, his counsel did, a record, a prior record against him in 1957, where he pleaded Guilty generally to Murder and was found guilty by the Judge of second degree murder and sentenced. Now, Members of the Jury, that isn't evidence to indicate to your mind that because he may have been guilty of that offense, that he is guilty of this offense here, not at all. It is only evidence for this purpose, the Commonwealth contends that he is the kind of a man, then, he is not worthy of being believed by you in this case, as affecting his credibility. The Commonwealth says to you that if he is that kind of a man, he is not worthy of being believed by you in this case, and that is the sole purpose of it.

The other defendants didn't take the stand, they don't have to take the stand. The fact that they do not take the stand is not to be considered as evidence against them. When they enter pleas of not guilty, that means they deny the commission of any offenses charged against them. Neither the Court nor Counsel have the right to comment adversely upon their failure to take the stand, and you bear that in mind, it is not to be considered as evidence against them because they are not required to take [fol. 377] the stand.

There, you have, briefly speaking, the testimony in the case, Members of the Jury, I'll not comment upon it any further, take it all into consideration whether the Court has mentioned it or not. If Court or Counsel have inadvertently misstated any part of the evidence, you correct that and take your own recollection. You are the sole judges of the facts, you are also the judges of the weight to be given to the evidence, and further, as to the credibility of the witnesses. If there are contradictions in the evidence it is the duty of the Jury to harmonize and reconcile them, if you can; If you cannot, then you must decide whom among the witnesses you will believe. In doing that, you have seen them on the stand, you have observed their manner and demeanor in testifying, consider that; consider the interest that the witness may have in the outcome of the case, or any bias or prejudice apparent to you, whether they are telling a likely or reasonable story, their knowledge or observation of the facts concerning which they testify to, and any contradictions in any evidence, together with the surrounding circumstances, all for the purpose of deciding who is telling the truth.

These are criminal cases, and the defendants come [fol. 378] into Court presumed to be innocent. That presumption remains with them until it is overcome by—credible evidence that satisfied your minds that they are guilty beyond a reasonable doubt. That does not mean beyond any doubt, it means, as the Law says, a reasonable doubt, a real substantial doubt, one arising out of the evidence in the case, not something that rises in your mind simply to escape performance of an unpleasant

duty. If something does arise in your mind which clouds your judgment, keeps you from coming to a satisfactory conclusion, honestly and conscientiously causes you to hesitate, or something arises in your mind of the character which would refrain or keep a reasonable man from acting in a matter of importance to him in his daily life, restrain him from acting, if such a doubt would arise in your mind as would restrain him from acting in a matter of importance to himself, that is a reasonable doubt, and if it arises, it is your duty to resolve that in favor of the defendant or defendants and return a verdict or verdicts of Not Guilty. On the other hand, if you have no such doubt in your mind, then you return the verdict you believe the evidence warrants.

I would say to you as to Ramsey and Jackson, Counsel asked me to say this, I thought I said it, if they were [fol. 379] simply there in this car and you believe that there was a robbery committed, well, that would apply as to any of them, so far as that goes, they didn't know there was any robbery committed and, therefore, didn't join in it, of course, there can be no conviction of any such person even though they might have been there, but it is all for you, Members of the Jury. You pass upon the guilt or innocence in each indictment separately and as to each defendant in the indictment, and also as to the counts which we have.

Does Counsel have anything further to suggest to the Court?

MR. JOHNSON: Nothing.

MR. BLUMENFELD: Your Honor, could I come to side bar a moment?

MR. BLUMENFELD: Your honor, I would like to request the Court to instruct the Jury that in so for as Jackson, and I guess this would apply to Ramsey, even if they did know the two men were leaving the car for the purpose of committing the robbery, they took no active part but merely sat in [fol. 380] the car, even under those circumstances, they wouldn't be guilty even if they did know the other people were going to commit the robbery.

THE COURT: I thought I did tell them that. Well, all right.

(End side bar.)

THE COURT:

Members of the Jury, Counsel for Mr. Jackson and Mr. Ramsey have asked me to state that even if those two people did know that the others were going out to commit robbery and did know about it and simply remained in there and taking no part in it, they couldn't be convicted. I agree with that if they had no part in it at all.

THE COURT: Anything further?

MR. BLUMENFELD: I didn't quite—I wasn't sure if the Jury you heard you say that even if they did know it was committed and they took no part in it—

[fol. 381] THE COURT: Did you hear what I said? I said if they did know and they didn't do anything about it, yet, they were not participating in it, taking any part in it, then, they couldn't be convicted. Does that answer it?

MR. BLUMENFELD: Yes.

THE COURT: Anything further?

MR. MEANS: Yes, for the record, so Counsel will have no objection, three of the Exhibits, consisting of live ammunition, which will fit into two of the other exhibits, the guns, the Chief here thinks it would be safer all around for the Jurors and everyone if the live ammunition did not go out with the Jury.

THE COURT: All right, we don't want the Jury shooting each other.

MR. MEANS: No objection from Counsel to withholding these exhibts?

[fol. 382] MR. JOHNSON: No.

MR. BLUMENFELD: No.

MR. TAMBURO: No.

(Jury retired at 1:50 P.M.)

[fol. 383] VERDICTS

And now, October 2, 1963, we, the Jurors, empanelled in the case at No. 78 June Sessions 1963, Commonwealth versus Raymond Lawson and Frank Chambers, find the defendants Guilty as indicted.

And now, October 2, 1963, we, the Jurors, empanelled in the case of No. 91 June Sessions 1963, Commonwealth versus Raymond Lawson, Frank Chambers, Henry Ramsey, Joseph Jackson, find the defendants Guilty as indicted.

(Counsel indicated their desire to file Motions.)

[Reporter's Certificate (omitted in printing)]

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

No. 1988 January Term, 1966D

COMMONWEALTH OF PENNSYLVANIA EX REL:
FRANK CHAMBERS, RELATOR

vs.

ROBERT W. DUGGAN, District Attorney Allegheny County, Pennsylvania; and JAMES F. MARONEY, Superintendent State Correctional Institution, Pittsburgh, Pennsylvania, RESPONDENTS

APPEARANCE DOCKET ENTRY

November 16, 1965. Habeas Corpus: Petition, affidavit filed. And now, November 16, 1965 it is ordered as follows: (1) That the attached Petition for Writ of Habeas Corpus be filed. (2) That Robert W. Duggan, District Attorney, Allegheny County, Pennsylvania, be added as an additional defendant. (3) That a rule be and the same is hereby granted on Respondents to answer the averments contained in the said Petition for Writ of Habeas Corpus, and to Show cause why a Writ of Habeas Corpus should not issue, said Rule returnable and said answer to be filed on or before December 20, 1965. (4) That F. Peter Dixon, Esq., be and the same is hereby appointed as counsel for Frank Chambers, Relator. (5) That copies of this Order be served by United States Mail, postage prepaid on Relator, Relators attorney and respondents. (6) All Costs to be paid by the County of Allegheny. December 10, 1965 Answer of James F. Maroney filed. April 20, 1966 It is ordered that argument be heard on the above entitled case on Friday, April 29,

1966 at 10:00 A.M. Eastern Standard Time. May 18, 1966 Testimony Lodged. June 3, 1966 Testimony lodged. October 21, 1966 Answer of Robert W. Duggan, District Attorney of Allegheny County. December 2, 1966, the Motion for a Writ of Habeas Corpus is dismissed. Eodie, Exceptions granted and Bill sealed. January 10, 1967 Certiorari of Superior Court in the appeal of Frank Chambers filed. July 21, 1967 Remittitur of Superior Court in the appeal of Frank Chambers, Order affirmed. Eodie Exemplifications filed. Eodie Application for allocations filed. June 16, 1967 Appeal from the Order of the Court of Common Pleas of Allegheny County at 1988 January Term, 1966. Order affirmed. July 21, 1967 Petition Denied, Per Curiam, Supreme Court.

FROM THE RECORD

/s/ James F. Clarke
Prothonotary

By /s/ Fred Owens, Jr.
Deputy

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988, Jan. 1966

HABEAS CORPUS

COMMONWEALTH OF PENNSYLVANIA EX REL

FRANK CHAMBERS, RELATOR

vs.

ROBERT W. DUGGAN, District Attorney Allegheny County, Pennsylvania; and JAMES F. MARONEY, Superintendent State Correctional Institution Pittsburgh, Pennsylvania, RESPONDENTS

ORDER OF COURT

AND NOW, to-wit, this 16th day of November, 1965, IT IS HEREBY ORDERED AS FOLLOWS:

1. That the attached Petition for Writ of Habeas Corpus be filed.
2. That Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, be added as an additional defendant.
3. That a Rule be and the same is hereby granted on Respondents to answer the averments contained in the said Petition for Writ of Habeas Corpus, and to show cause why a Writ of Habeas Corpus should not issue, said Rule to be returnable and said Answer to be filed on or before December 20, 1965.
4. That F. Peter Dixon, Esq., be and the same is hereby appointed as counsel for Frank Chambers, Relator.
5. That copies of this Order be served by United States Mail, postage prepaid, on James F. Maroney, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania; on Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania; on Relator and on Relator's counsel.
6. All costs to be paid by the County of Allegheny.

BY THE COURT:

/s/ J. Frank Graff, C.J.
33rd Judicial District
Specially Presiding

IN THE COURT OF COMMON PLEAS
COUNTY OF ALLEGHENY
COMMONWEALTH OF PENNSYLVANIA

1988, Jan. 1966

COMMONWEALTH OF PENNSYLVANIA EX REL

FRANK CHAMBERS, PETITIONER

PETITION TO PROCEED IN FORMA PAUPERIS

To the Honorable President judge of above named Court. The Petitioner of Frank Chambers Respectfully represents

(1) That he Is a Pauper without monies or means of Collateral to pay costs of any proceedings. Petitioner has no property nor knows anyone who would pay costs of any proceedings caused by him.

Therefore Petitioner motions This Honorable court to pay any costs of proceedings as excuted herein from the beginning to the end.

And permit him to proceed In Forma Pauperis and the Petitioner will Forever Pray

Respectfully Submitted

/s/ Frank Chambers
Petitioner

This 30 day June 1965

/s/ William C. Schnupp
WILLIAM C. SCHNUPP
Notary Public
Pittsburgh, Allegheny County
My Commission Expires November 29, 1965

[SEAL]

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

No.

In Re: Indictment 78 and 91
June Term 1963

COMMONWEALTH OF PENNSYLVANIA EX REL
FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent State Correctional Institution Pittsburgh, Pennsylvania

JURISDICTION

This court has jurisdiction; Act of May 25, 1951, 415-.12.P.S. 1901,

PETITION FOR WRIT OF HABEAS CORPUS

To: The president judge and associate judges of the above court;

The petition of Frank Chambers Respectfully Represents;

Petitioner contends that his incarceration In the state correctional institution In the city of Pittsburgh, Pennsylvania; Is a deprivation of liberty without due process of law as guaranteed by the due process clause of Article 1 section (g) of the Pennsylvania Constitution and the Fourteenth Amendment of the United States constitution,

CASE HISTORY

On May 21, 1963 Approximately 1: Oclock a.m. the petitioner was arrested while In a car with three (3) men, The car was stopped In Rankin PA. by the police of the Borough of Swissvale PA. The police from the Borough of North Braddock was called. When they arrived the car was searched nothing was found. The petitioner and the car owner was then taken to the police

station In North Braddock, and questioned concerning a robbery of a Service Station that was said to have taken place two hours earlier In that Borough.

The car was searched again, still nothing was found.

The petitioner requested to make a phone call If he was to be held further, but was denied. At this point, Forty-six-dollars was taken from his person and he was immediately transferred from the North Braddock police station To East Pittsburgh PA. and lodged In jail.

Some thirty hours later he was returned to North Braddock and was told that another search had been made of the car and that two (2) revolvers, some change, and some cards were found.

The cards were said to have belonged to a Service Station Attendant that was robbed a few weeks earlier In McKeesport PA.

STATEMENT OF ISSUES INVOLVED

Petitioner contends that he was denied due process and equal protection of the law as guaranteed by the 14th Amendment, which embodies incorporates Amendments 4, 5, 6 particularly that which guarantees the rights involved In due process of law In criminal prosecutions;

(1) Wherein: The search of the car that was subsequent to the arrest was remote and not contemporaneous when made without a warrant hours after petitioner and the car was In police custody.

See: Preston vs United States 84 S. Ct. 881, 376 U.S. 364 11 L.Ed. 777 and cases cited therein.

It was held that searches of motor cars must meet the test of reasonableness under the 4th Amendment before evidence obtained as a result of such searches Is admissable,"

The right to search and seizure without a warrant extends to things under the accused immediate control. Caroll v. United States Supra, 267 U.S. at 158, And to an extent depending on the circumstances of the case, to the place where he was arrested, Agnello v. United States Supra, 269 U.S. at 30; Marron v. United States

275 U.S. 192, 199 (1927); United States vs. Rabinowitz 339 U.S. 56, 61-62 (1950)

The rule allowing contemporaneous searches Is justified for example, By the need to seize weapons and other things as well as by the need to prevent the destruction of evidence of the crime. But these justifications are absent where a search Is remote In time or place from the arrest. Once an accused Is under arrest and In custody, then a search made at another place without warrant Is simply not incident to the arrest, Agnello vs. United States Supra, 269 U.S. at 31,

The police had the right to search car when they stopped vehicle. But this does not decide the question of reasonableness of a search at a later time and at another place See Stone vs. California 84 S.Ct 889 Where the search of the car was not undertaken until petitioner and companion had been arrested and taken In custody to the police station and the car to the police parking lot. at this point there was no danger that any of the men arrested could have used any weapons In the car or could have destroyed any evidence Cf. United States vs. Liffres 342 U.S. 48, 51-52 (1951) Nor since the men were under arrest at the police station and the car was In police custody was there any danger that the car would be moved out of the locality or jurisdiction. See Carrol vs. United States Supra 269 U.S. at 153

In this instant case It must be noted that the car was In route toward the scene of the crime an hour or so after said crime was allegedly committed. The petitioner not being the owner of the car cannot be responsible for any article found In the vehicle.

(2) The search warrant issued to search petitioners home failed to meet the 4th Amendment requirement of particularly describing the article to be seized.

In this instant case the home of petitioner was searched some revolver shells were found and seized and used as evidence against petitioner, The said articles was not mentioned on the face of the search warrant, see Mapp v. Ohio 367 U.S. 643 Which States "We hold that all evidence seized In violation of the constitution Is by the same authority inadmissable In a state court," also see

Marron v. United States 275 U.S. 192-196: see generally; Kaplan search and seizure No mans land In the criminal law 49 Calif. L. Rev 474, 480, 482 (1961) see Chapman v. United States 365 U.S. 610 which states a land lord cannot lawfully consent to a search of his tenents premises.

(3) Petitioner was denied an impartial and fair trial wherein he was convicted of armed robbery and also the charg of receiving stolen goods, The United States supreme court held In Malanovich v. United States 365 U.S. 554, 81 S.C.T. 728 S Led. 2d 773 (1961) and Heflin vs. United States 358 U.S. at 419-420 79 S.Ct. 453 & 854 3 Led 2d 407;

"A defendent cannot be guilty of stealing and possessing the same article;

The above principal did apply In petitioner case and those concerned permitted petitioner to be found guilty of both charges armed-robbery and recieving stolen goods

It must be noted that this instant case was tried two times The first ended In a mis-trial, The petitioner was given new and different counsel when the case was relisted for trial counsel was appointed the same day of trial, this poses the following contentions.

(4) The accused has the right to have effective aid and assistance of counsel See White v. Ragen supra, McKenna v. Ellis 280 F 2d 5925 5th Cir (1960)

Defense counsel being appointed the same day of trial without time to investigate and prepare the case nor even consult with the accused Is a denial of due process. See com v Cavanaugh 183 PA. 417 133 A. 2d 288 (1957) Linden v Dickson 287 F 2d. 55 (9th Cir 1955) Rocce v. GA. 76 S. Ct. 169 "Affective assistance of counsel In a state court prosecution Is a constitutional requirement of due process which no state may disregard,"

Petitioner In this instant case appeared In court twice for trial and twice for sentencing and each time new and different counsel was appointed.

Due process of law has been defined many times and has been held to require oppotunity to defend and a fair trial, Com v O'Keefe 289 PA 169, Powell v Alabama.

Opportunity to defend cannot fairly be said to be offered petitioner under the circumstances of this record as attested by the records of said proceedings, neither can a fair trial be adduced therefrom.

Abundant authorities which has been handed down throughout the years relative to the counsel issue and search and seizure and the convicting for robbery and receiving stolen goods would lend no contrary opposition to this foregoing cause.

Wherefore It Is clear In this cause, if our petitioner was over reached and thus denied the equal protection as provided by article 1 sec g of the penna constitution and the 14 amendment of the United States.

The petitioner states for reasons assigned he prays issuance from under the hand and seal of this Honorable court an order to the above superintendent and the District Attorney of this county, commanding them to "show cause" why the prayer of this petition should not be granted, that upon return an immediate day and date be set for a hearing upon the merits of this cause.

And he will evermore pray

/s/ Frank Chambers
Petitioner

Comes now Frank Chambers petitioner being duly sworn according to deposes and says that the within facts are true and correct to the best of his knowledge beliefe and understanding.

Sworn and subscribed before me this 30 day of June 1965

/s/ William C. Schnupp
WILLIAM C. SCHNUPP
Notary Public
Pittsburgh, Allegheny County
My Commission Expires November 29, 1965

[SEAL]

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 January, 1966

COMMONWEALTH OF PENNSYLVANIA EX REL
FRANK CHAMBERS

vs.

ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania, and JAMES F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania

ANSWER

AND NOW, to-wit, this 29 day of April, 1966, comes ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania, by LOUIS ABROMSON, Assistant District Attorney, and, in answer to the petition for a writ of habeas corpus, respectfully shows:

THE SENTENCE

The Petitioner is presently serving backtime for a parole violation on a sentence of five (5) to ten (10) years which had been imposed on October 22, 1954, on a charge of Armed Robbery at 45 April Sessions 1954.

At No. 58 June Sessions 1963 the Petitioner was sentenced to a term of four (4) to eight (8) years by Judge Weaver on a charge of armed robbery.

At No. 78 June Sessions 1963 the Petitioner was sentenced by Judge Graff to a term of four (4) to eight (8) years on a charge of armed robbery. This sentence was to run concurrently with the sentence imposed at No. 58 June Sessions by Judge Weaver.

At No. 91 June Sessions 1963 the Petitioner was sentenced on a charge of armed robbery to a term of two (2) to seven (7) years. This sentence was to be served consecutively with the sentences imposed at Nos. 58 and 78 June Sessions 1963.

THE FACTS OF THE CRIME

The indictment at No. 78, June Sessions, 1963, charged the Petitioner, together with certain of his accomplices, with the crime of armed robbery and receiving stolen goods. The indictment was tried before His Honor, Judge Graff, and a jury. The facts developed at that trial may be briefly and accurately summarized as follows:

There was a Boron Service Station in the City of McKeesport, Allegheny County, Pennsylvania, where the attendant was one Raymond Habicon, a former police officer. At about 2:20 A.M., two colored men entered the service station and, with a .38 caliber nickel and chrome revolver, demanded money. They took about sixty dollars ($60.00) in cash, which was the property of the station, and ten dollars ($10.00) in cash from the attendant, Habicon. They also took from Habicon certain cards, including a driver's license, owner's card, and club cards.

Approximately a week later there was a holdup of another gasoline station which will be later referred to. The suspects in this second robbery were apprehended; when these suspects in the second robbery were taken to the police station, Habicon was called and, without hesitation, he positively identified Chambers as one of the two men who had robbed him; and further stated that it was the Petitioner, Chambers, who held the revolver.

The car which was used in the second robbery was searched and the cards, including the driver's license, owner's card, and club cards, as well as a .38 caliber revolver, were found in it; and in this same car the Petitioner was a passenger.

These facts were submitted to the jury, which returned a verdict of guilty, and a sentence of not less than four (4) years nor more than eight (8) years was imposed. This sentence was concurrent with a sentence imposed by Judge Weaver.

The indictment at No. 91, June Sessions, 1963, charged the Petitioner, together with certain of his accomplices, with the crime of armed robbery and receiving stolen goods. The indictment was tried before His Honor, Judge

Graff, and a jury. the facts developed at that trial may be briefly and accurately summarized as follows:

There was a Gulf Service Station in the Borough of North Braddock, Allegheny County, Pennsylvania. Stephen Kovacich, an attendant at the Gulf Station, was outside the office when two colored men, both armed with guns, forced him to open the register which contained a lot of change and some bills. The attendant had a glove, and at gun-point, the Petitioner and his accomplice forced him to place the change in this glove. The amount stolen was approximately forty-five dollars ($45.00).

Linda Oschinick, aged 14, and Jerry Klaus, aged 17 years, were at the service station shortly before the robbery. They testified that they saw a blue station wagon circling the block in which the Gulf Service Station was situated. A short while later they saw this same station wagon pulling out of a parking lot which was some feet away from the Gulf Service Station. They heard a man shouting that he had been robbed. They informed the police of their observations, and further told them that one of the occupants wore a green sweater.

Within one hour, the blue station wagon was stopped with the Petitioner and three occupants in it. The Petitoner, when stopped, had on a green sweater. The car was searched, and a glove, containing a large amount of change was found in the glove compartment.

The Gulf Service Station attendant was unable to identify this Petitioner at the time of the trial, although he did identify him at the magistrate's office. The attendant, Kovacich, identified the glove found in the station wagon as his glove, and as the one in which the robbers had ordered him to place the change.

The jury returned a guilty verdict on that indictment, and a consecutive sentence of not less than two (2) years nor more than seven (7) years was imposed.

THE HABEAS CORPUS PETITION

The Petitioner alleges that his constitutional rights were violated in that the car which was used in the robbery was searched without a warrant; that the Peti-

tioner's home was searched with a warrant that was invalid; and in that counsel was appointed on the day of the trial without time to investigate and prepare the case.

The contention that the car was illegally searched is wholly without merit. There was probable and reasonable cause for the search since the facts show that there had been a robbery; that a blue station wagon was observed speeding away from the scene of the robbery immediately after the victim cried out that he had been robbed. Police officers were alerted to look for a car of that description occupied by four colored men, one of whom wore a green sweater. The police obseved a car answering the description which was given to them and observed in it four colored men, one of whom wore a green sweater. They stopped the car; arrested the occupants in Rankin in the night time when it was dark; a flashlight failed to reveal any evidence of stolen goods or of any weapons. The car was driven from Rankin to the North Braddock Police Station. There a thorough search was made, and guns and other evidence, material to the Commonwealth's case, were found. The car which was searched did not belong to this Petitioner. Therefore, it was not his property which was searched, and he is not in a position to complain about the search of another man's property. Aside from this well-established principal, the search of the car may be justified as an incident to a legal arrest. When the car was first stopped it was dark, and a thorough search was not made, and could not be made, because it was necessary to take the suspects to the police station. Within minutes after the car was taken to the police station a more thorough search was made, and that search resulted in the finding and seizure of the guns and other items which were secreted in a vent beneath the dash-board. (See Pages 129 and 160 of the transcript.)

It would be absurd to contend that unless the search were made at the very spot, and at the very instant of the arrest, the search would be illegal. Rankin joins North Braddock Boro, and the distance from the spot where the car was stopped to the North Braddock Police

Station is a very short distance. There was no unreasonable elapse of time between the arrest and the search, nor was the search made at a unreasonable distance from the place of the arrest.

The contention that counsel did not have sufficient time to prepare a defense is wholly without merit. The facts are that this Petitioner was arrested in May, 1963. Legal Aid was appointed to represent this Petitioner at his first trial, which resulted in the withdrawal of a juror. Legal Aid had a complete and full record of the facts in this case. Mr. Middleman was a member of the Legal Aid Staff, and represented this Petitioner at his first trial. Mr. Tamburo was also a member of the Legal Aid Staff, and he had full and complete access to the file; full and complete information of the facts of the case; and was an experienced criminal trial lawyer. The record as set forth in the transcript is sufficient to show that this Petitioner was adequately represented.

The third contention presents a more serious question. It appears that the home of this Petitioner was searched at 9:00 A.M. on May 21. The Petitioner had been arrested at about 1:00 A.M. on that day. It appears also from the transcript that the police officers had a warrant for that search of the Petitioner's home. (Page 193). However, prior to the testimony of the police officer, James Heverly, the counsel for the Petitioner, who knew the Commonwealth proposed to offer this evidence, made an objection to that testimony. (Page 115). The objection was based, not on the illegality of the warrant, but on the ground of the irrelevancy of the evidence seized on that warrant. After Officer Heverly testified, counsel again objected to the evidence seized in the home of the Petitioner. This time the objection was made on the ground that there was not reasonable ground for the search, and that the warrant did not specify the items for which the officer was searching. The Commonwealth represents to the court that the search warrant was not among the papers in the Commonwealth's proceedings which resulted in the Petitioner's conviction. Further, the Commonwealth has made a diligent effort in an attempt to locate the search warrant, but, up to the time of the filing of this answer, has been unsuccessful.

This Petitioner had every opportunity to file a motion to suppress any evidence allegedly seized without a proper search warrant. Had such a motion been filed, the question now raised could have been determined. There is no allegation that Petitioner did not know of the existance of the evidence of which he now complains. There is no contention that the Petitioner was surprised by the introduction of this evidence. As a matter of fact, counsel knew of this evidence before it was introduced. (Page 115). The Petitioner, it is submitted, cannot for the first time raise this question. During the trial, however, the court did permit counsel to cross examine Officer Heverly in connection with the search but the cross examination consisted only of the fact that the officer did not know, when he went to the Petitioner's house to search it, that the bullets were there. He also elicited from the officer the fact that the search warrant did not specify that the search was for bullets. The facts and the record in this case clearly show that guns were found in the constructive possession of this Petitioner. These facts show further that a robbery had been committed, and that these guns were used in the robbery. It was therefore reasonable to believe that bullets which might have fitted these guns might be found in the Petitioner's home; and that the officer was justified in requesting a search warrant; and that the magistrate who issued this search warrant, under these facts, would be warranted in issuing the warrant. It should be remembered that this is not a case where a home was searched without a warrant. There was a warrant in this case, and it cannot be assumed that the magistrate who issued this warrant was not furnished with sufficient facts to justify the issuance of the warrant.

Our courts have held that if the issue of the invalidity of the search and seizure is not raised by a pre-trial motion, that issue cannot be raised by a petition for a writ of habeas corpus. *Commonwealth ex rel. Ensor* v. *Cummings*, 204 Pa. Superior Ct. 1; *Commonwealth* v. *Puntari*, 198 Superior Ct. 70.

In this case the Petitioner had every opportunity, by filing a motion to suppress, to raise the question he now

raises. Had that been done, the Commonwealth could have shown that the special circumstances which did justify the magistrate in issuing the warrant had been submitted to that magistrate; the Commonwealth could have shown that the officer seeking the warrant knew that a crime had been committed, and that he had probable cause to believe that the instruments of the crime, or items related to the instruments of the crime, were in the Petitioner's home. It is earnestly submitted that by a failure to file such a motion the Commonwealth has been prejudiced, and that this question cannot be raised after conviction.

WHEREFORE, the Respondent respectfully prays that the rule heretofore issued be discharged and that the petition be dismissed.

Respectfully submitted,

ROBERT W. DUGGAN
District Attorney of
Allegheny County

By /s/ Louis Abromson
Assistant District Attorney

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 of January 1966

Habeas Corpus

COMMONWEALTH OF PENNSYLVANIA, EX REL.
FRANK CHAMBERS

vs.

ROBERT W. DUGGAN, District Attorney for Allegheny County Pennsylvania, and JAMES F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Penna.

Pittsburgh, Penna.
May 13, 1966

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

May 18, 1966 Testimony Lodged

June 2, 1966 Testimony Lodged

William F. Vodde,
Official Stenographer
312 Courthouse
Pittsburgh 19, Pa.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 January 1966

Habeas Corpus.

COMMONWEALTH OF PENNSYLVANIA, EX REL.
FRANK CHAMBERS

vs.

ROBERT W. DUGGAN, District Attorney for Allegheny County, Pennsylvania, and JAMES F. MARONEY, Superintendent of the State Correctional Institution, Pittsburgh, Penna.

Pittsburgh, Penna.
May 13, 1966

BEFORE: HON. J. FRANK GRAFF, J.,
Specially Presiding.

COUNSEL PRESENT:

For the Petitioner:

F. Peter Dixon, Esq.

For the Commonwealth:

Louis Abramson, Esq.,
Assistant District Attorney.

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY

William F. Vodde,
Official Stenographer
312 Courthouse
Pittsburgh 19, Pa.

A

[fol. 2]

Pittsburgh, Penna.
May 13, 1966

Defendant present with Counsel.

THE COURT: Do you want to take any testimony on this matter?

MR. DIXON: If the Court please, the only testimony will be about three questions which I would like to ask the defendant and that will be the extent of the testimony.

THE COURT: All right.

FRANK CHAMBERS, the Petitioner, being duly sworn, testified as follows:

DIRECT EXAMINATION

MR. DIXON:

Q Would you state your name, please?
A Frank Chambers.
Q How old are you?
A Forty.
Q Have you presented before the Court of Common Pleas of Allegheny County, a Petition for Writ of Habeas Corpus?
A Yes.
Q Is that the reason for your appearance here in Court today?
A Yes.

[fol. 3] Q Now, recalling your trial, which is the basis for this Petition, would you tell the Court by whom you were represented at that time?
A Well, now, there was two trials.
Q The second trial?
A Mr. Tamburo.
Q Vincent Tamburo?
A Yes.
Q Was he then a member of the Legal Aid Society?
A Yes, he was.
Q And you were an indigent person, you required the services of the Legal Aid Society, and Mr. Tamburo?

A Yes.

Q Prior to the time that you appeared in Court with Mr. Tamburo, and we are talking about the second trial, prior to the time you appeared in Court with Mr. Tamburo to select a jury, had you ever seen or talked to Mr. Tamburo before that?

A I met him in the hallway on the way to the Courtroom.

Q On the way to the Courtroom?

A Yes.

Q Was this the day of your trial?

A Yes.

Q Do you recall when you were placed under arrest?

[fol. 4] A 21st of May, 1963.

Q What time of the day was it?

A About 1 A.M.

Q Where were you at the time you were placed under arrest?

A Rankin, Pennsylvania.

Q Was this at a police station or what?

A This was before.

Q Before they took you to the police station?

A In Rankin.

Q This is when the Swissvale Police stopped you?

A Yes.

Q And took you into custody along with three others?

A Yes.

THE COURT: You were in this car with three other person at the time?

A Yes, sir.

MR. DIXON: That's all.

CROSS EXAMINATION

MR. ABROMSON:

Q You were in the Allegheny County Jail for some period of time before your trial on these charges, is that right?

A That's right.

Q And you were also in the Allegheny County Jail on a charge of Robbery which was tried before Judge Weaver?

[fol. 5] A Well, not prior to the trial—see, if I—I have to make a distinction here, it was three distinct different charges, and I was tried on the charge here in front of Judge Davis, I believe it was, prior to the second trial in front of Judge Graff.

Q You mean Judge Weaver?

A No—

THE COURT: He is talking about the previous trial he had here before Judge Davis on these same charges.

Q You're talking about the new trial—

A No, I'm talking about the original charge.

Q What is the original charge you are referring to?

A The one in North Braddock.

Q Did that involve the gasoline station?

A Yes, it did.

Q And what happened, you were picked up, is that right?

A I was picked up in Rankin.

Q You were driving in a car near the scene of the robbery?

A Yes.

Q And there were three accomplices with you, is that correct?

A There were three men in the car along with me.

Q There were three men in the car?

[fol. 6] A Yes.

Q The car was a blue station wagon, is that right?

A That's right.

Q And one of the occupants wore a green sweater?

A Yes.

Q Do you know there were two youngsters who saw the car?

A Yes, I heard that at the trial.

Q And you attended the trial?

A Yes.

Q And the Rankin Police picked you up, is that right?

A Swissvale Police stopped me in Rankin.

Q Then you were lodged in jail?

A Right.
Q And when was that, sir?
A 21st of May.
Q When was your trial?
A Which one are you talking about, the first one or second one?
Q I'm talking about the trial before His Honor, Judge Graff?
MR. DIXON: September.
THE COURT: What year?
MR. ABROMSON: September 5, 1963.

MR. ABROMSON:

Q So you had been in Jail for some five months, is [fol. 7] that correct, before your trial?
A Yes.
Q And during that time, did anybody come to see you in your own behalf?
A Which way do you mean? Did any attorney come to see me?
Q Did anyone come to see you in your own behalf?
A Yes.
MR. DIXON: I want to make clear to the District Attorney it is not our intention to attack the effectiveness of counsel here. The only reason I brought out this particular circumstance was in relationship, and I will develop it, to the District Attorney's contention that our issue of the suppression of the evidence not being timely, that's the only reason I brought that out.
THE COURT: You are not raising—
MR. DIXON: I am not raising the issue of the ineffectiveness of counsel.
THE COURT: It is in his statement here, his petition, but you are not raising it now?
MR. DIXON: No.
THE COURT: What you are raising now is the illegality of the search warrant?
[fol. 8] MR. DIXON: Yes.
THE COURT: And are you also raising the illegality of this search?
MR. DIXON: Yes.

THE COURT: The search of the car and the illegality of the search of his house?

MR. DIXON: As well as the lack of probable cause of the arrest initially. We argue that the arrest was not lawfully made, as well.

MR. ABROMSON:

Q Well then, the car in which some evidence was seized did not belong to you?

A No, it didn't.

Q It was not your car?

A No.

Q It belonged to a companion, Mr. Lawson?

A Yes.

Q And it was his car and not yours that was searched?

A That's right.

Q And it was in that car where the evidence—certain evidence was found, is that correct?

A That's right.

[fol. 9] Q And at the time the car was searched, you had already been arrested, is that not right?

A Yes, I had been stopped by the police, I guess I was arrested.

MR. ABROMSON: I think that's all I have.

THE COURT: All right, you are raising the question here of the illegality of the arrest, there wasn't probable cause for arresting him; secondly, that the search of the car was not incidental to the arrest. It will show here by an examination of the record that the search in which these guns, as I recall, and cards and so on, that was sometime later after the car had been taken to the police station, isn't that correct.

MR. ABROMSON: That's correct.

THE COURT: He is challenging that and he is challenging the fact there was a search warrant issued and they searched his home.

MR. ABROMSON: He said nothing about that.

THE COURT: What is it you are raising?

MR. DIXON: Those three items: illegality of the arrest, the lack of or effectiveness of the warrant for the

[fol. 10] premises and the introduction of the evidence which was procured by an invalid warrant.

THE COURT: How do you contend there was an invalid search warrant, on what basis?

MR. DIXON: The search warrant was invalid in this particular sense in that it did not specify that bullets were to be sought for on the premises, yet bullets were seized on the defendant's premises. These bullets were introduced into evidence at the trial over objections of counsel for the Defense.

MR. ABROMSON: That's all a matter of record, I do not see the need for taking any testimony on that.

MR. DIXON: I don't want to take any more testimony.

MR. ABROMSON: Then, as I understand it, there is no question here with respect to the adequacy of counsel?

MR. DIXON: That's correct.

MR. ABROMSON: The only questions concern the probable cause for the arrest, the search of the car and search of the home?

[fol.11] MR. DIXON: That's exactly right.

THE COURT: All right, better transcribe this.

MR. ABROMSON: If the Court please, I would like to ask this witness one question.

MR. ABROMSON:

Q Mr. Chambers, did you while this petition was pending, did you within the past week or two file a petition in the Federal District Court?

A About two months ago, yes; it was denied, I got a refusal yesterday on the Petition.

THE COURT: I didn't hear that.

A Well, I filed a Petition in the District Court to remove my cause to Federal jurisdiction and it was denied as of yesterday, stating that since the State Courts have seen fit to give me a hearing, it was—

THE COURT: In other words, it's been denied because the case is pending here in this Court?

A That's right.

THE COURT: All right. We will have this testimony transcribed.

[Reporter's Certificate (Omitted in Printing)]

The foregoing record of the proceedings taken at the trial of the within cause is hereby approved and directed to be filed.

/s/ J. Frank Graff

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 January Term, 1966.

COMMONWEALTH OF PENNSYLVANIA, EX REL.
FRANK CHAMBERS, RELATOR,

vs.

ROBERT W. DUGGAN, District Attorney for Allegheny County Pennsylvania, and JAMES F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania, RESPONDENTS.

Pittsburgh, Pennsylvania,
Thursday, November 3, 1966.

CORAM: HON. J. FRANK GRAFF, J.,
Specially Presiding.

APPEARANCES:

On behalf of the Commonwealth:

Louis Abromson, Esq., Assistant District Attorney.

On behalf of the Respondents:

F. Neal Sever, Esq.

TRANSCRIPT OF OFFICIAL NOTES OF PROCEEDINGS

[fol. 2] THE COURT: Do you want to argue this matter?

MR. DIXON: I have no desire to argue this matter, Your Honor. I think this brief will suffice.

THE COURT: Do you want to answer that brief, Mr. Abromson?

MR. ABROMSON: I believe, Your Honor, that in our answer we covered the subject matter, and if I recall correctly the sole important fact in this case was the validity of a search made at the home of this defendant.

MR. DIXON: That is the most important issue, although I have raised others in my brief, as the petitioner did in his petition.

THE COURT: A question I am concerned with in this case is whether this is a matter to be raised on a writ of habeas corpus. It seems to me it's more a matter of taking an appeal. However, I will go into the matter, but I think there should be an appeal taken. I know the

appellate courts are not too clear on the matter, but they do unequivocally say, and have said on numerous occasions, that a habeas corpus is not a substitute for appeal. I have noted some cases here on the matter where it's not a substitute for appeal.

MR. DIXON: Of course, that is true as a question of law, Your Honor, but the facts in this case I think would substantiate a constitutional violation of such substance that the error would be such a fundamental one that it would be such that could be raised and should be [fol. 3] raised even after the appeal period had ended.

THE COURT: Well, I mean even now why don't you come in here and say, "Allow us to take an appeal"? However, I have been wanting your brief. This fellow has been bothering me a great deal. If you have your brief I will take it.

MR. ABROMSON: The record will show, and I think counsel will agree, there was no motion made to suppress the evidence which is here at issue.

MR. DIXON: That is true.

THE COURT: Pardon me?

MR. ABROMSON: The record will show, and counsel will stipulate, that there was no motion filed to suppress the evidence which is now the subject of the complaint.

THE COURT: There wasn't?

MR. ABROMSON: No, Your Honor.

THE COURT: There was an objection.

MR. DIXON: Yes.

MR. ABROMSON: An objection, but no motion to suppress.

THE COURT: Did you raise that question in your answer?

MR. ABROMSON: Yes.

THE COURT: All right.

[Reporter's Certificate (Omitted in Printing]

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

Trial Judge.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 January Term, 1966

COMMONWEALTH EX REL. FRANK CHAMBERS

vs.

ROBERT W. DUGGAN AND JAMES F. MARONEY

OPINION OF COURT

J. FRANK GRAFF, P.J.
Specially Presiding

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 1988 January Term, 1966

COMMONWEALTH EX REL. FRANK CHAMBERS

vs.

ROBERT W. DUGGAN AND JAMES F. MARONEY

OPINION OF COURT

GRAFF, P. J., Thirty-Third Judicial District, Specially Presiding

This matter comes before us upon a petition for a Writ of Habeas Corpus. Counsel was appointed for the petitioner and thereafter it was concluded that a hearing for the purpose of taking testimony would not be necessary. The defendant, together with others, was tried before us upon two indictments, to wit, at No. 78 and 91 June Sessions, 1963, in which the charge was armed robbery.

On the early morning of May 13, 1963, the Boron Service Station in the City of McKeesport was entered by two colored men armed with revolvers, and by means of threat the sum of $70.00 was taken, as well as certain

cards in the name of the operator of the station, to wit, driver's license, owner's card and club cards. On May 20, 1963, another armed robbery occurred of a Gulf Service Station in the Borough of North Braddock, this county, at which time the operator was forced to open the register and approximately $45.00 in change was stolen. This change was placed in a glove belonging to the attendant. Two teenage children observed a blue stationwagon circling the block in which the Gulf Service Station was situated and heard a person shouting that he had been robbed. This was reported to the police and a warning sent out to apprehend such a car. The children also testified that one of the men was wearing a green sweater. Within an hour a blue stationwagon was stopped in which the petitioner and three other persons were seated. At this time Chambers was wearing a green sweater. The four occupants were taken into custody and taken to the North Braddock Police Station a short distance away. At the time of the apprehension of the car a search was made thereof but because of the darkness nothing was discovered. When the car was taken to the North Braddock Police Station the search was continued, and in a private compartment underneath the dashboard there was found the glove containing change, the cards belonging to the operator of the Boron Service Station, and two .38 caliber revolvers. Havicon, who was the operator of the Boron Service Station, was called to the police station where he immediately identified Chambers as being the person who had a gun at the time of the robbery of his station upon May 13. A search warrant was issued at nine o'clock upon the same day as the second robbery for the premises occupied by the petitioner, Chambers. In this search was found some .38 caliber shells and a box filled with the same kind of ammunition. All of these articles just named were introduced upon the trial of the case. The jury returned verdicts of guilty as indicted. No motions were filed, either for a new trial or in arrest of judgment, and thereafter sentence was imposed. At No. 78 June Sessions the defendant was sentenced to imprisonment for a term of not less than four nor more than eight years, to run concurrently

with the sentence previously imposed at No. 58 June Sessions by Judge Weaver. At 91 June Sessions the defendant was sentenced to a term of imprisonment of not less than two nor more than seven years, to run consecutively with the sentences imposed at 58 and 78 June Sessions, 1963. The defendant had been previously tried for the offenses now under consideration at which time he was represented by a Mr. Middleman, a member of the Legal Aid Staff, and in this case a mistrial was declared and a juror withdrawn. At the second trial the defendant was represented by a Mr. Tamburo, also of the Legal Aid Staff. Both of these attorneys are able and experienced criminal trial lawyers. The petitioner first contends that the arrest was made without probable cause, and the evidence obtained pursuant thereto was inadmissible.

An armed robbery had occurred within an hour before the apprehension and a blue stationwagon containing four men was seen leaving the scene when there was a shout that a person had been robbed. Information was also given that one of the persons was wearing a green sweater. This car was apprehended in a neighboring borough, and under the circumstances, we have no hesitation whatever in stating that there were reasonable grounds for the arrest, and therefore, any evidence obtained in such was properly admitted in evidence.

It is next contended that the evidence was not obtained as an incident of the arrest but rather at the police station a short time thereafter and, consequently, was not admissible under the theory of evidence obtained incident to an arrest. It is first to be observed that a search of the car was immediately attempted but because of the darkness this could not be thoroughly done, and within a few minutes thereafter the search was continued at the police station, at which time the stolen articles and guns used in the robbery were found. We are of the opinion that under such circumstances the search was only a continuation of the one incident to arrest. However, the petitioner was not the owner of the car. Immunity from unreasonable search is personal and a defendant cannot object to the search of another's premises or property:

This position is without merit.

The defendant next contends that he was not adequately represented by counsel. Mr. Tamburo, who represented the defendant, is an attorney of great experience in the trial of criminal cases and did afford effective representation. Absence of effective representation means representation so lacking in competence that it becomes the duty of the Court or prosecution to correct it so as to prevent a mockery of justice:

Commonwealth ex rel. Crosby v. Rundle
415 Pa. 81;
Commonwealth ex rel. Spensky v. Maroney
208 Pa. Superior Ct. 301.

The petitioner now challenges the admission of the evidence found at his home after a search warrant had been issued for the same at nine o'clock on the following morning. Unfortunately, this search warrant is not available and was not at the time of the trial. However, at the time of the trial the Court permitted the officer who executed this warrant to be cross examined, and he stated that no bullets had been mentioned in the search warrant. Counsel for the defense first objected to the admission of this evidence upon the ground that it was irrelevant. This objection was overruled. Later he objected on the grounds that there was no reasonable grounds for the search and that the warrant did not specify the bullets which were seized under the warrant. Because of the absence of the search warrant we are unable to determine what goods were specified. Undoubtedly the search was for the purpose of obtaining evidence which would have some bearing upon the charges upon which the defendant was tried. It is permissible to seize things other than those described in the search warrant if they have a reasonable relation to the purpose of the search:

Commonwealth ex rel. Stoner v. Myers
199 Pa. Superior Ct. 341.

The case of Mapp v. Ohio, 367 US 643, had been decided at the time of the trial of this case. Although the

Pennsylvania Rules of Criminal Procedure, particularly Rule 2001(b) had not been adopted at this time relative to a motion to suppress evidence, the Federal Courts had adopted Rule 41(e) which required that the motion to suppress must be made prior to the time of the trial if the defendant desired to object to the admission of the alleged illegal evidence:

Jones v. United States
362 US 257.

Inasmuch as the Mapp decision provided that the Federal rule relative to unlawful search and seizure is applicable to the states, it would follow that the procedural rules of the same court would be applicable to the states. Therefore, the failure to file the motion to suppress was prejudicial to the Commonwealth and cannot now be raised in this proceeding:

Commonwealth ex rel. Culley v. Myers
422 Pa. 561, 564.

There were no Post Conviction motions filed and consequently no appeal. The matters now raised should have been determined in an appeal. It is well settled law that habeas corpus is not substitute for an appeal:

Commonwealth ex rel. Bowers v. Rundle
200 Pa. Superior Ct. 496, 498.

In Commonwealth ex rel. Ensor v. Cummings, 416 Pa. 510, this question was permitted to be raised on an appeal for the reason that counsel failed to anticipate the subsequent ruling enunciated in Mapp.

See also:

Commonwealth ex rel. Stoner v. Myers Supra;
Commonwealth ex rel. Clark v. Maroney
199 Pa. Superior Ct. 552.

After careful consideration of this case we conclude that the motion for a writ of habeas corpus must be dismissed.

ORDER

AND NOW, December 2nd, 1966, the motion for a Writ of Habeas Corpus is dismissed.

By the Court,

/s/ J. Frank Graff
P.J., 33rd Judicial District
Specially Presiding

Eo die Exception granted and Bill sealed.

By the Court,

/s/ J. Frank Graff [SEAL]
P.J., 33rd Judicial District
Specially Presiding

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

No. 88 April Term, 1967

COMMONWEALTH OF PENNSYLVANIA, EX REL.
FRANK CHAMBERS

v.

JAMES F. MARONEY, Superintendent State Correctional Institution, Pittsburgh, Pennsylvania

Appeal of Frank Chambers

DOCKET ENTRIES

January 4, 1967, Petition in forma pauperis granted.
Appeal from the order and opinion of the Court of Common Pleas of Allegheny County at No. 1988 January Term, 1966.
January 4, 1967, Appeal and affidavit filed and writ exit, returnable second Monday of April, 1967.
March 13, 1967, Appearance for appellee, filed.
April 6, 1967, Record and Testimony, filed.
April 10, 1967 Submitted

DECISION

June 17, 1967
Order affirmed.

Per Curiam.

June 29, 1967, Petition for allowance of appeal filed at No. 2913A Miscellaneous Docket.

July 21, 1967 REMITTED

FOR APPELLANT:

FRANK CHAMBERS, I.P.P.

FOR APPELLEE:

ROBERT W. DUGGAN
District Attorney
EDWIN J. MARTIN
Assistant District Attorney

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 88 April Term, 1967

No. 160

COMMONWEALTH OF PENNSYLVANIA, EX REL. FRANK CHAMBERS, APPELLANT

v.

ROBERT W. DUGGAN, District Attorney of Allegheny County, and JAMES F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY AT No. 1988 JANUARY TERM, 1966

PER CURIAM

FILED: June 16, 1967

Order affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 2913A Miscellaneous Docket

COMMONWEALTH OF PENNSYLVANIA, EX REL.
FRANK CHAMBERS

v.

JAMES F. MARONEY, Superintendent State Correctional Institution, Pittsburgh, Pennsylvania

DOCKET ENTRIES

June 29, 1967, Petition of Frank Chambers for allowance of appeal from the judgment of the Superior Court at No. 88 April Term, 1967, filed.

ORDER

July 21, 1967

Petition denied

Per Curiam.

February 25, 1970, Notice of Appeal to U. S. Supreme Court, filed.

FOR APPELLANT:

FRANK CHAMBERS, I.P.P.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

JUDGE MARSH

Jury demand date: Non Jury

67 1050

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution

For plaintiff:

No. C-3561
P. O. Box 9901, Pgh 15233

For defendant:

JAMES F. MARONEY
P. O. Box 9901, Pgh. 15233
ROBERT W. DUGGAN, Dist. Att.
Allegheny Co. Bldg., Pgh., Pa. 15219

CIVIL DOCKET

STATISTICAL RECORD

J.S. 5 mailed
J.S. 6 mailed
Basis of Action:

Petition for writ of habeas corpus—violation of constitutional rights

Action arose at:

67 1050

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pa.

DATE	PROCEEDINGS
1967	
Aug. 29	Proof of service, Petition to proceed in forma pauperis, Motion for appointment of counsel and Petition for writ of habeas corpus filed by petitioner. Doc. No. 1
Aug. 31	Order entered directing that the petitioner is permitted to proceed in forma pauperis; further ordered that a rule to show cause is issued to show cause why a writ of habeas corpus should not be granted; further ordered that the D. A. of Allegheny County file an answer on or before 10-2-67; further ordered that the respondent make a return to said rule within 3 days of the date of service; further ordered that the D. A. on behalf of the respondent comply with Rule 16(g); further ordered that the date for hearing on rule to show cause is fixed for 12-4-67 at 2:30 P.M. No testimony will be taken at this hearing; service of the rule, together with a copy of the petition shall be made upon the Supt. by the U. S. Marshal. Service of the rule, together with copy of the petition, shall be made upon the D. A. of Allegheny County and the Atty. Gen. of Pa. by the U. S. Marshal by registered mail. (Marsh, J.) Doc. No. 2
Aug. 31	Copies of the petition & order given to the Marshal for service.
Sept. 8	Copy of Order Rule & Petition returned served on James F. Maroney, Atty. General and Dist. Atty. by certified mail, return receipts dated 9-7-67. Doc. No. 3

DATE		PROCEEDINGS
1967		
Sept.	12	ANSWER filed. Doc. No. 4
Oct.	9	Answer filed by D. A. of Allegheny County. Doc. No. 5
Dec.	4	Hearing held on Habeas Corpus petition before Marsh, J. and concluded, CAV.
Dec.	4	Hearing memo filed. (Rep: E. Pock) Doc. No. 6
Dec.	8	Trans filed re: Hearing held on 12-4-67 on Rule to Show Cause before Marsh, J. at Pgh Pa. (C5 Rep E. Pock) Doc. No. 7
1968		
Feb.	23	Petition to proceed in forma pauperis and petition for the setting of Bail filed. Doc. No. 8
Feb.	27	Order, dated 2-26-68, entered directing that petitioner's "Petition for the Sitting (sic) of Bail" is denied. (Marsh,J.) Doc. No. 9
Mar.	6	Opinion filed and Order entered directing that the Rule to show cause is discharged & the Petition for Writ of Habeas Corpus is denied; there is probable cause warranting an appeal for the reason that judicial opinion may reasonably differ with respect to the admission of the bullets in evidence. (Marsh,J.) Doc. No. 10
Mar.	6	Pursuant to Opinion filed and Order entered, petition for writ of habeas corpus is hereby denied. James H. Wallace, Jr., Clerk
Mar.	6	Notice mailed.
Mar.	7	Petition to proceed in forma pauperis and Petition for certificate of probable cause filed by petitioner. Doc. No. 11
Mar.	8	Order, dated 3-7-68, entered directing that petition for certificate of probable cause to appeal from the Order of 2-26-68, denying Petition for the Setting of Bail, be and the same hereby is denied. (Marsh, J.) Doc No. 12

DATE	PROCEEDINGS
1968	
Mar. 8	Copy of the Docket Entries mailed U. S. Court of Appeals.
Mar. 12	Order dated 3/11/68 entered amending 3/6/68 Opinion. (Marsh, J.) Doc. No. 13
Mar. 13	Order entered permitting the petitioner to appeal in forma pauperis from the denial of his petition for writ of habeas corpus. (Marsh, J.) Doc. No. 14
Mar. 13	Petition to proceed in forma pauperis and Motion for Appointment of Counsel, and Petition for certificate of probable cause (considered as informal notice of appeal) filed by petitioner. Doc. No. 15
Mar. 15	Copy of informal notice of appeal and certified record mailed Ct. of Appeals; copies of docket entries to D. A. of Allegheny County and petitioner; letters to Supt. Maroney and Attorney General of Pa.
Mar. 20	Receipt for the record rec'd from Ct. of Appeals.
Apr. 8	Copy of letter rec'd from Ct. of Appeals advising that appeal was docketed at No. 17,219.
Apr. 25	Certified copy of Order of McLaughlin,J. received from U. S. Court of Appeals and filed directing that petitioner is granted leave to file typewritten briefs and appendix. The applications for appointment of counsel and for release on bail are denied. Doc. No. 16
Nov. 21	Certified record of Allegheny County (1988, Jan. Term 1966—Comm. of Pa. ex rel Frank Chambers vs. D. A. of Allegheny County, et al) sent to Ct. of Appeals as a supplement to the record on appeal.
Nov. 26	Receipt for the Allegheny County record rec'd from Ct. of Appeals.

DATE	PROCEEDINGS
1969	
Jan. 24	Opinion of Ct. of Appeals rec'd and filed affirming denial of the writ of habeas corpus of the District Court. Doc. No. 17
Apr. 3	Certified copy of Judgment issued in lieu of a formal mandate received from U. S. Court of Appeals and filed directing that the judgment of the District Court is affirmed, with costs. Doc. No. 18
Apr. 3	Original Record received from U. S. Court of Appeals and receipt for same mailed this day.
Apr. 17	State Court Records received from U. S. Court of Appeals.
Apr. 17	State Court Records returned to Assistant D.A. Abromson by mail.
1970	
Feb. 24	Original certified record mailed to Supreme Court of United States upon request.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. ———

Indictment Numbers 78 and 79
June Sessions, 1963

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

PETITION FOR WRIT OF HABEAS CORPUS

To: The Honorable Chief Judge and Associate Judges of the above said Court: The Petition of Frank Chambers (Respectfully Represents)

That he is being unlawfully restrained by the Respondent above named at the above said Institution, pursuant to a Jury trial, conviction and order of sentence by the Court of Common Pleas of Allegheny County. On indictment Numbers 78 and 91 June Term, 1963, for the alleged crimes of Armed Robbery for which he received sentences of from 4 to 8 years and 2 to 7 years.

That the arrest and evidence seized pursuant thereto were the first of unlawful procedure predicated upon a unconstitutional methods which violated his indictments, trials verdict and judgement of sentence by the Court of Common Pleas of Allegheny County, and in violation of Petitioner's Constitutional rights as guaranteed by the 4th, 5th, 6th and 14th Amendment of the United States Constitution and Article 1 Sections 8 and 9 of the Pennsylvania Constitution.

Therefore, Petitioner's conefinement and unlawful restraint are totally lacking in the essentials of due process and equal protection of the laws as guaranteed by the 14th Amendment.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court pursuant to Title 28 U.S.C.A. 2241-2255, *Fay* vs. *Noia*, 372 U.S. 391; *Townsend* vs. *Sain*, 372 U.S. 293.

The Petitioner herein has met the statutary pre-requisite of Title 28 U.S.C.A. 2254 inasmuch as the State Courts remedies has been exhausted as listed below.

Habeas Corpus petition in the Court of Common Pleas of Allegheny County at No. 1988 January Term, 1966 The same was denied. Order filed December 2, 1967.

Appealed to Superior Court at No. 88 April Term, 1967. Denied "Per Curiam," order filed June 16, 1967

Appealed to the Supreme Court at No. 2913A Miscellaneous Dosket. Allowance of Appeal denied Per Curiam. Order dated July 21, 1967

CONSTITUTIONAL QUESTIONS INVOLVED

Was Petitioner denied due process and equal protection of the Law as guaranteed by the 14th amendment to the United States Constitution which embodies incorporate amendments 4, 5, and 6 particularly that which guarantees the rights involved in due process of the Law in criminal prosecution?

Wherein:

(1) The arrest was made without proable cause and the evidence seized pursuant thereto was admitted at trial, of his case;

(2) The search of the car in which Petitioner was a passenger was remote and not contemporaneous, made without a warrant hours after petitioner and automobile was in police custody and the evidence siezed there from was used against him at trial

(3) The warrant issued to search petitioner's residence was invalid in that it did not specify the articles that was seized and later introduced into evidence at trial;

(4) The belated appointment of Counsel rendered his services ineffective, in that he was delegated to represent petitioner enroute to the Court room the day of the trial.

HISTORY OF CASE

On May 21 1963 at approximately 1:00 A.M. Petitioner was arrested while in a car with (3) three men,

the car was stopped in Rankin, Pa, by the police of the Borough of Swissvale Penna. The police from the Boroughs of Rankin and North Braddock were called when they arrived the car was searched. Nothing was found.

The Petitioner and the owner of car was taken to the police station in North Braddock and there questioned concerning a a robbery of a Gulf Service Station, that was said to have taken place and hour or so earlier in Borough.

The car was further searched a second time and nothing was found. Petitioner requested to make a phone call if he was to be held further, but his request was refused. At this point $46.00 dollars was taken from Petitioner's, person and he was immediately transfered from the North Braddock Police Station to East Pittsburgh Police Station and Lodged in Jail.

Some 36 hours later he was told returned to the North Braddock Police Station and was told that another search had been made of the car, that (2) two revolvers, some change and some personal cards were found, also that a search had been made at Petitioner's Home, where some revolver shells were found.

The personal cards that was said to have been found in the car was said to belong to a Boron Service Station Attendant that was robbed a week earlier in McKeesport Penna. Suseqently Petitioner was convicted on both Robberies

ARGUMENT

(1.) The arrest of petitioner was illegal and without probable cause and the evidence seized pursuant thereto is inadmisible at trial.

The Supreme Court of the United States has clearly established the criteria for Lawful arrest *See Beck* vs. *Ohio* 379 U.S. 89, 13 L. Ed.2d 142, 85 S.Ct. (1964), *Giordinello* vs. *United States*, 357 U.S. 480-488. That whether an arrest is Lawful or not depends upon whether,

> "at the moment the arrest was made the officers had probable cause to make it . . . whether at that moment the facts and circumstances within thier knowledge of which they had reasonable trustworthy in-

formation to warrant a prudent man in believing that the petitioner had committed or was comitting an offence.

Petitioner avers that the arresting officers in this instant case did not have probable cause to arrest petitioner because they were not in possession of sufficient information linking petitioner with the commission of the said crime.

The only facts within the arresting officers knowledge was that of a Blue Station Wagon that was seen leaving the general vicinity of the said crime with four colored occupants therein. They were not in possession of the license number of the said automobile. The said Station Wagon was not seen leaving the scene of the alleged crime it was simply in the general area.

The said Station Wagon in which petitioner was a passenger was stopped an hour or so after the alleged crime, while traveling toward the scene of the said crime. It is concievable that there were other Station Wagons in that general vicinity as well as a number of other automobiles with four colored occupants [It must be noted that the said robbery was allegedly committed by two men.] Certainly all the automobiles that was in the general area was not and could not be stopped and the occupants arrested simply on these bare facts.

The Supreme Court further held: As justifying arrest without a warrant by one believed guilty of a felony or to be engaged in the commission of a felony is a belief rising out of facts and circumstances known to officers that a party is engaged in the commission of crime."

In this instant case the facts and circumstance were insufficient to justify the stopping of the automobile and the arresting of his occupants more than an hour later in anothe Borough

The Supreme Court of the United States has further held: We assume that officers acted in good faith in arresting petitioner . . . but good faith on the part of arresting officers was not enough. *Henry* vs. *United States,* 361 U.S. 98, 102. If subjective good faith alone were the test, the protection of the 4th Amendment would

evaporate be sercue in there person,. house papers and effects only in discretion of the police"

It was only the evidence of discovered and siezed after this unlawful arrest which led to petitioner's conviction.

Since the arrest violated proable cause requirement the fruits of that illegal arrest was improperly used against petitioner at trial.

QUESTIONS #2

The evidence unlawfully obtained from the automobile in which petitioner was a passenger was improperly admitted against him in that they were obtained without a warrant hours after petitioner and the car were in police custody.

The Supreme Court of the United States in *Preston* vs. *United States*, 376 U.S. 364. "That searches of motor cars must meet the test of reasonableness under the 4th Amendment before evidence obtained as a result of such searches is inadmissible.

In the Preston case, cited above the automobile was taken into police custody after the arrest of the occupants and taken to a police garage where it was searched. That search revealed incriminating later introduced at trial.

The Court held that the search of the car without a warrant was too remote in time, or place to have been incidental to the arrest and evidence obtained was inadmisible. The Court pointed out that even assuming that the previous arrest was valid and that the police had the right to search the car when it was initially stopped that did not decide the question of reasonableness of a search at a later place.

In this instant case the car in which petitioner was a passenger was stopped by the Swissvale police. The police from Boroughs of Rankin and North Braddock were called, the car was searched, nothing was found. Petitioner and the owner of the car was taken to the North Braddock police station, where a second and third search was made of the car. Petitioner was already under arrest and in custody of police and there was no danger that the automobile would leave the jurisdiction, nor any evidence or contents could be destroyed. Therefore, the

search of the automobile in this instant was remote and not contemporaneous, or incidental to the arrest, therefore, the search of the automobile was illegal and the evidence siezed there from was inadmisible at trial.

Since such evidence was admitted at the trial of petitioner his conviction cannot stand.

Petitioner Has Standings to Raise the Question of the Illegal Search of Premises Belonging to Another.

In the case of *Jones* vs. *United States*, 362 U.S. 257 (1960). The question was raised whether the defendant could move to surpress evidence obtained while he was in an apartment own by another but in which he was temporarily with permission of real tenant. The Court held; that those facts "made out a sufficient intrest in the premises to establish him as a person aggrieved by the search."

Mr. Justice Frank, further, held inter alia which I quote in part. "That to prevent the defendants attack upon the search, would permit the government to have advange of contradictory positions as basic for conviction, yet fruits of that search upon which conviction depends, were admitted into evidence on grounds that defendant did not have possession of narcotics at that time so that prosecution subject defendant to penalties meted out to one in that situtation.

The petitioner in this instant case was in the automobile with the permission of the owner, who in fact was driving. Therefore, petitioner had a sufficient intrest in the premises to qualify as person aggrieved by the search of the automobile and the use against of the articles found therein.

The Supreme Court further stated in *Jones* vs. *United States* 80 S.Ct. 725 at page 734

> "No just intrest of the government in the effective and rigorous enforcement of the Criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to supress, when its fruits are proposed against him."

In this instant case petitioner was without Counsel prior to trial. Counsel was delegated to represent petitioner enroute to the Courtroom the day of the trial. This belated appointment of Counsel rendered his services ineffective, he had no knowledge of the facts and missed any and all oppurtunities of pre-trial motions or hearings and discovery oppurtunities, which in itself is a denial of due process and equal protection of the law.

"QUESTION #3"

The search warrant issued to search petitioner's res-was void. It did not specify the items that were seized and later introduced as evidence against him at trial. Therefore the said warrant was fatally defective and the evidence seized by virture of the said warrant, was inadmisible at trial. It is now well settled that the 14th Amendment's Right to privacy been declared enforceable against the States trough due process clause *Mapp* vs. *Ohio* 367 U.S. 643, 658, 81 S.Ct. 1684, 1691, 6 L. Ed.2d 1081 (1961).

The 4th Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, also particularly describing the place to be searched and the person or things to be seized.

Nothing is more basic in constitutional law than the requirement search warrant must particularly describe to place and things to to be seized. *Stanford* vs. *Texas* 85 S.Ct. 506 (1965). In this instant case the said warrant was conveniently lost, for it would cast doubt upon all the prosecutions evidence to the probable cause from the begining of the process

The officer who searched petitioner's home admitted at page 203 in the trial notes of testimony, that search warrant did not specify the items seized.

Under cross examination Policeman James Heverly of the Borough of North Braddock testified as follows:

> Question: You did not know that there were going to be any bullets in the Chambers house when you went there, did you?
> Answer: No Sir.

Question: You were just there, to see what you could find is that right?

Answer: Right.

Question: There is nothing in that search warrant that in anyway indicate that you were looking for bullets is that right?

Answer: No Sir.

From the above quotations it is evident that the warrant was a general warrant, completely void of particularization as specifically required under the 4th Amendment. See: *Aquilar* vs. *Texas* 378 U.S. 108 84 S.Ct. 1509, 12 L. Ed. 723 (1964); *Nathanson* vs. *United States*, 290 U.S. 41, *Ker* vs. *California*, 374 U.S. 23. As cited in *Commonwealt* vs. *Alvares* —— Pa. —— Sept 15, 1966.

It has been said by the Supreme Court of the United States:

> "General warrants and the use thereof was the motivating factor behind the framing of Declaratin of Independence"

At the trial your petitioner, the bullets and other items obtained from his home were introduced into evidence against him. This was highly prejudicial and direct violation of his constitutional rights which should alone sustain petitions request for Habeas Corpus relief.

(QUESTION #4)

The belated appointment of Counsel rendered his services ineffective.

The United States Supreme Court has said in a long line of cases,

> "The right to Counsel means effective Counsel, It is not sufficient that defendant was represented by a member of the Bar or even by a lawyer who is very competent in other fields, if the Attorney was unfamiliar with the crucial problems of the case as to be unable to make an effective defense, defendant has been deprived of his right to Counsel."

In this instant case Counsel was delegated to represent petitioner enroute to the Court room the day of the trial.

A review of the trial transcript will reveal the possible defense that was open to petitioner had there been a timely appointment of Counsel.

The Learned Judges in *Commonwealth ex rel. Spensky* vs. *Maroney* 494 P.L.U. 27, He also condemned the practice the pactice of appointing Counsel for a prisoner at the time of trial.

The Court in: *United States* vs. *Helwig* 3 C.U. 159 F2d. 686; *Linden* vs. *Dickson* 287, F2d. 55 (9th Cir 1961).

> "Counsel for an indigent defendant held in custody must be appointed by the Court sufficiently far in advance of trial to enable him to prepare the defence." *Commonwealth* vs. *O'Keefe* 298 Pa. 169, 173, 148 A. 73-74, the Court said: "It is vain to give the accused a day in Court with no oppurtunity to prepare for it or to guarantee him Counsel without giving the latter any oppurtunity to aquaint himself with the facts of the case. also see *Jones* vs. *Cunningham* 313 F2d. 347 and cases cited therein

In view of the circumcumstances in this instant case the appointed counsel enter the case to late to afford petitioner petitioner effective representation.

The said Counsel had missed the discovery oppurtunity of pre-trial hearing or afforded the oppurtunity to file pre-trial motions. See: Fields vs. Peyton No 10, 776 4th Circuit and cases cited therein.

CONCLUSIONS

In view of all the attending facts and circumstances in this case and attitude taken by trial Judge at the Habeas Corpus Hearing in concluding "that a hearing for the purpose of taking testimony would not be necessary," Clearly shows the prejudicial circumstances under which petitioner labored in presenting his case.

See Opinion filed by the Court of Common Pleas, attached hereto.

The Supreme Court of the United States held, Federal Court must grant evidentiary hearing to Habeas Corpus applicant if, Merit of factual dispute were not resolved in State Hearing; State factual determination is not fairly supported by record as a whole; fact finding procedure in State Court was not adequate to afford full and fair hearing. (Inter alia) See *Townsend* vs. *Sain* 372 U.S. 293; *Fay* vs. *Noia* 372 U.S. 391.

It is clear from the foregoing that petitioner was not afforded constitutional due process of equal protection of law as guaranteed by the Contitution of the United States, and the statutes formulated to prevent these illegal acts committed by the Courts of Pennsylvania to secure and maintain an illegal conviction and sentence.

Wherefore petitioner pray this Honorable Court hear his cause and order his release from under this illegal confinement which is contrary to the due process and equal protecting Clause of the 14th Amendment.

Respectfully Submitted

/s/ Frank Chambers
(Petitioner)

Sworn to and subscribed before me this 25 day of Aug 1967

/s/ William C. Schnupp
WILLIAM C. SCHNUPP
Notary Public
Pittsburgh, Allegheny County
My Commission Expires November 29, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 67-1050

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

And now comes James F. Maroney, Superintendent of the State Correctional Institution at Pittsburgh, respondent above named, and admits that Frank Chambers is being confined and restrained of his liberty in the State Correctional Institution at Pittsburgh, but in answer hereto states as follows:

(1) The said Frank Chambers was received into the Western Correctional Diagnostic and Classification Center on 23 October 1954, after having been sentenced on 22 October 1954, by the Honorable Samuel A. Weiss in the Court of Oyer and Terminer of Allegheny County at No. 45 April Sessions 1954 to serve a term of 5 to 10 years for Armed Robbery; said sentence to be computed from 22 October 1954.

(2) The records of the Western Correctional Diagostic and Classification Center were computed to show the minimum term to have expired on 22 October 1959 and the maximum on 22 October 1964.

(3) The said Frank Chambers was transferred from the Western Correctional Diagnostic and Classification Center to the State Correctional Institution at Pittsburgh on 24 December 1954, and from there to the State Correctional Institution at Rockview on 29 November 1957 from whence he was released on parole on 22 October 1959 with the approval of the Pennsylvania Board of Parole.

(4). The said Frank Chambers was returned to the Western Correctional Diagnostic and Classification Center on 27 January 1964 under additional sentences imposed on him in Allegheny County as follows:

(a) No. 58 June Sessions 1963—Armed Robbery—4 to 8 years; sentence imposed by Honorable L. T. Weaver.

(b) No. 78 June Sessions 1963—Armed Robbery—4 to 8 years; sentence imposed by Honorable J. F. Graff and to run concurrent with sentence imposed at No. 58 June 1963.

(c) No. 91 June Sessions 1963—Armed Robbery—2 to 7 years; sentence imposed by Honorable J. F. Graff and to run consecutive with sentences imposed at Nos. 58 and 78 June Sessions 1963.

(5) In accordance with an opinion of the Superior Court of Pennsylvania in the Case of Commonwealth ex rel. Lerner vs. Smith, 151 Pa. Superior 265 (as affirmed by the Supreme Court of Pa. in the Wheeler Case), the sentences were entered on the records of the Western Correctional Diagnostic and Classification Center as being computed to run consecutively with the sentence imposed on 22 October 1954 rather than concurrently.

(6) Under the provisions of Section 10, Act #348, approved by the Governor on 19 June 1911 and amended 22 June 1931, because of a conviction of a new crime while on parole, the said Frank Chambers forfeited the time between his release on parole, 22 October 1959, and the date his maximum term would have expired, 22 October 1964. That time amounts to 5 years which, added to the effective date of his return, 24 January 1964, makes his new maximum for parole violation expire on 24 January 1969.

(7) The said Frank Chambers was transferred on 6 April 1964 from the Western Correctional Diagnostic and Classification Center to the State Correctional Institution at Pittsburgh where he is presently confined.

(8) Respondent has no knowledge of any other allegations made by the Petitioner.

So Answers:

/s/ James F. Maroney
James F. Maroney
Superintendent

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 67-1050

UNITED STATES OF AMERICA, EX REL, FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

ANSWER

And now this 2nd day of October, 1967, comes Robert W. Duggan, District Attorney of Allegheny County, by Louis Abromson, Assistant District Attorney, and in answer to the Petition filed in this case respectfully shows:

THE SENTENCE

The Petitioner here attacks a sentence of 4 to 8 years imposed at No. 78 June Sessions, 1963, and a consecutive sentence of 2 to 7 years imposed at 91 June Sessions, 1963. These sentences are being served concurrently with another sentence of 4 to 8 years imposed at No. 58 June Sessions, 1963.

HISTORY OF THE CASE

The Petitioner was indicted at No. 78 June Sessions, 1963, on a charge of armed robbery of one Raymond Havicon, Manager of a Boron Service Station in the City of McKeesport. At No. 91 June Sessions, 1963, he was indicted on the charge of armed robbery of a Gulf Station in North Braddock, Allegheny County, Pennsylvania. He was represented by counsel, entered a plea of not guilty, and was tried by a jury, both indictments have been consolidated for trial. The jury returned verdicts of guilty on each of the indictments, no motion for new trial was filed, the sentences above set forth were imposed, and no appeal was taken.

THE FACTS OF THE CRIMES

On May 20, 1963, the Gulf Service Station in the Borough of North Braddock was robbed at gun point and the sum of $45.00 in change was seized. The victim

placed this change in a glove. After seizing this money, the robbers fled from the station. The attendant cried out that he had been robbed. The robbers fled in a blue station wagon. Two teen-age childred, ages 14 and 17 testified they had observed a blue station wagon circling the gasoline station for some time prior to the robbery. They testified that there were four occupants in the car. These occupants were colored, and one of them wore a green sweater. The police were given a description of the car and of the occupants, and within an hour stopped a blue station wagon in which there were four colored individuals, one of whom wore a green sweater. They were taken into custody and brought to the North Braddock Police Station. A search of the car was made but nothing was found at that time. The arrest was made some time around 1:00 A.M., and the blue station wagon searched. This was begun at the time of the arrest when it was dark, and was continued in the morning and in a private compartment underneath the dashboard, the officers found a glove containing change, two revolvers and certain cards bearing the name of one Havicon. Stephen Kovacich, the attendant of the Gulf Service Station, at whom the gun was pointed, and from whom the monies were seized and placed in a right hand glove, had identified this Petitioner as one of the robbers, but the Petitioner at the time of the trial wore different clothing, and had shaved off his mustache, so that at the time of the trial Mr. Kovacich was unable to identify him.

The jury returned a verdict of guilty on this charge of the robbery of the Gulf Service Station in North Braddock.

The police, as a result of the search of the car found in the compartment certain cards bearing the name of Raymond Havicon, who was an attendant at a Boron Oil Service Station in McKeesport. Mr. Havicon was called by the police for the purpose of seeing if he could identify these cards. He did identify these cards and testified that on May 13, 1963, while he was working in the Boron Oil Service Station, two colored men entered the office of the Station, and at gun point robbed him of $66.00, and his wallet containing his cards. At the trial

he positively identified the Petitioner as one of the robbers and as the robber who drew the revolver. The jury returned a verdict of guilty on that robbery of the Boron Oil Station at McKeesport.

THE HABEAS CORPUS PETITION

The Petitioner has exhausted his State remedies and this Court has jurisdiction.

None of the contentions of the Petitioner have any merit whatsoever. The first contention is that he was arrested without a warrant and that the arrest was made without probable cause. It is not necessary to repeat the facts in detail. A blue station wagon was seen circling the North Braddock Station, the Station was robbed, the police had full and complete information that the felony of robbery had been committed, they had information as to the activities of this station wagon prior to the robbery, they had information that there were four colored occupants in that car and that one of them was wearing a green sweater, and these facts clearly warranted any prudent individual exercising ordinary common sense in the reasonable belief that the occupants of this station wagon had committed the robbery, and that they fled in the station wagon, and they would have been derelict in their duty had they not stopped that car and searched it.

The second contention was that the car was searched without a search warrant. This contention is wholly without merit. The record shows clearly that this Petitioner did not own the car which was searched. It showed clearly that this car belonged to one of his accomplices, Mr. Lawson. Petitioner did not have possession of the car, did not have the right to possession, did not have title or ownership of the car. The fact that he was in a car which was fleeing the scene of a robbery does not give him such proprietary right in that car, as would enable him to assert the claim of an unreasonable search. Further, if this Court could be some stretch of the imagination hold that this Petitioner could assert that the fruit of the crime seized in a car which belongs to another is inadmissable, this Petitioner could not sustain his position. The search which was made in the dark failed to

disclose any evidence of any kind. When daylight came, the police made a more thorough search of this car which they had taken to the police station. That search resulted in the finding of the fruits of the two crimes. It is clear, therefore, that this was a continuing search, and that the police who had the absolute right to search the car as an incident to the arrest, were justified in continuing their search of the car. It cannot be said that if the police failed to find the fruits of the crime within two minutes or five minutes after stopping the car, that they are precluded from making further search of the same a bit later when daylight will enable them to more thoroughly search the car. In this case the search was made when it was daylight and took place six or seven hours after the first search failed to reveal the fruits of the crime. This clearly was a continuous search and was not so remote in time or place as to render the evidence discovered inadmissable.

The third contention raised by the Petitioner presents a more difficult problem. He alleges that his apartment was searched and evidence found in that apartment was used against him. That evidence consisted of certain cartridges which fitted into the revolver found by the police in the car. He alleges that the search was illegal in that no warrant was produced to authorize that search and that the oral testimony of the police officer who made the search established clearly that the alleged search warrant did not specify that the cartridges and other ammunition was mentioned in the search warrant. In his Petition the Petitioner alleges that the police claim that this search warrant was *conveniently* lost. The facts are that the search warrant has been lost, that an assiduous search has been made for it and that it could not be found. This Court should find, as the State Court and the jury found, that there was a search warrant. The records sustain the contention of the Petitioner that the search warrant did not specify that it authorized a search for cartridges and ammunition. The Petitioner is not entitled to every benefit of doubt. A search warrant did exist, certain assumptions, in favor of the Commonwealth are warranted, because assumptions may be that the warrant did authorize a search of the premises,

that the Petitioner who had prior criminal experience might have the fruits of other crimes in his apartment, and that the warrant was issued for such other evidence. It is not necessary to specify the particular items which are being sought if during legal search certain articles are not found, but other articles or items of evidence which may have some value are found. This Petitioner could not sit idlely by and fail to file a motion to supress evidence which was allegedly illegally seized, and take his chances on a verdict, then years later raise the question of improper warrant. He had the duty prior to trial to file a motion to supress. His failure to do so precludes him from raising this question at this late date.

The last contention made by the Petitioner is that his counsel was inadequate. Mr. Tamburo, his counsel, was a member of the Legal Aid Society. The Legal Aid Society was named long before the date of the trial to represent this petitioner. It had been the practice of the Legal Aid Society to send one of its investigators to interview those whom they were appointed to represent. In this case, the Legal Aid Society would send an investigator to interview the Petitioner, they would secure all the facts in connection with these charges. These facts were reduced to writing in a written report, and this report was turned over to Mr. Tamburo. The Petitioner would have effective representation and the fact that the jury returned a guilty verdict against the Petitioner in no way establishes the Petitioner's allegation of inadequate counsel.

WHEREFORE, the Commonwealth respectfully prays that the Rule heretofore issued be discharged and that the Petition be dismissed.

Respectfully submitted,

ROBERT W. DUGGAN
District Attorney of
Allegheny County

By /s/ Louis Abromson
LOUIS ABROMSON
Ass't District Atty.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 67-1050

UNITED STATES OF AMERICA, EX REL,
FRANK CHAMBERS, PETITIONER

vs.

JAMES F. MARONEY, Superintendent, State Correctional Institution, Pittsburgh, Pennsylvania, DEFENDANT

HEARING ON RULE TO SHOW CAUSE HELD ON MONDAY, DECEMBER 4, 1967 BEFORE THE HONORABLE RABE F. MARSH, DJ.

APPEARANCES

LOUIS ABROMSON, ESQ.

For the Respondent.

[fol. 2] THE COURT: U.S. ex rel. Chambers against Maroney. The District Attorney has sent to us information and indictment at No. 78 June Session, 1963; information and indictment, 91 June Sessions, 1963; transcript of testimony of the trial at indictments Nos. 78, and 91 June Sessions 1963; the motions of co-defendants and opinions at the above numbers and terms; habeas corpus petition filed in the Court of Common Pleas of Allegheny County at No. 1988 January Term, 1966, and answer of the District Attorney of Allegheny County; transcript of testimony taken at the habeas corpus hearing on May 13, 1966; transcript of testimony taken at the habeas corpus hearing on November 3, 1966; copy of opinion of Judge Graff and order dismissing the petition; copy of petitioner's appeal and brief filed in the Superior Court of Pennsylvania; brief of the District Attorney of Allegheny County filed in the Superior Court of Pennsylvania; and order of the Superior Court of Pennsylvania, affirming the lower court's order. Said

documents received from the District Attorney shall be admitted in evidence.

Could I ask you, Mr. Abromson, did he ask for an appeal to the Supreme Court of Pennsylvania and if not, has he exhausted the state remedy?

MR. ABROMSON: In my answer, Your Honor, on [fol. 3] page 3, the habeas corpus under the caption, the Habeas Corpus Petition, I think that the petitioner has exhausted his state remedies and this Court has jurisdiction.

Now, what happens generally, on the petition for an allocatur, there is no opinion, that is, on an allocatur from the Superior Court to the Supreme Court, there is no opinion but a brief letter stating, "Your petition has been denied."

THE COURT: As happened in the Price case.

MR. ABROMSON: Yes, and in the light of my representations to this Court, as set forth on page 3, I would say that he has done what he's required to do.

THE COURT: All right. The Commonwealth admits that the relator has exhausted his state remedies. Off the record. Do you want a record?

MR. ABROMSON: Yes, I would like to have a record, Your Honor. This case, Your Honor, involves a conviction at No. 78 June Sessions, 1963, on a charge of armed robbery and a consecutive sentences of two to seven years at 91 June Sessions, 1963 also involving armed robbery.

The aggregate of those two sentences are being served concurrently with a sentence of four to eight, imposed at 58 June Sessions, 1963.

[fol. 4] The facts relating to the first armed robbery are substantially as follows:

A Gulf station in North Braddock was robbed at gunpoint. Shortly before, immediately after the robbery, the victim cried out, "Robbers, robbers," called for the police.

The police arrived at the scene immediately and there were two youngsters who informed the police that they had seen a blue station wagon with four colored occupants in it, one wearing a green sweater, circling that station shortly before the robbery and as the robbers

ran out of the—ran from the station into the car, they were the same people and the same car whom they had seen circling the station.

They gave that information to the police. The police gave chase and in a very short time, they observed a car, a blue sedan with four colored occupants, one of them wearing a green sweater. They stopped that car and they arrested the occupants on the charge of armed robbery.

On that charge and on that testimony, they were convicted of the robbery of the Gulf station in North Braddock but when they stopped the car, they searched the compartment of that car and they found in it certain [fol. 5] cards which was later identified as being the property of another gasolene attendant in McKeesport, as I recall, and based on the fact that recently stolen merchandise found in the possession of the defendant gives or warrants a jury in finding the fact of a robbery, the jury returned a verdict of guilty. There was a jury trial. So those are the facts briefly in the case. In the two cases.

Now, in this habeas corpus petition which I believe Judge Graff most carefully considered, he raises several contentions.

The first contention is that when the police arrested him, they didn't have a warrant. We have got to bear in mind that a robbery had just been committed; that the police were in hot pursuit; that they had probable cause to believe that the description that had been given to them were the robbers and under those facts, there can not be any basis for the claim that the arrest was illegal, because there was no warrant.

THE COURT: Excuse me.

MR. ABROMSON: Yes.

THE COURT: There was a hearing on the habeas corpus?

MR. ABROMSON: Oh yes, Judge Graff held a hear- [fol. 6] ing and I believe Your Honor has the testimony of the transcript.

THE COURT: I believed this was tomorrow morning. I just didn't refresh myself.

MR. ABROMSON: The next contention, as understood by the Commonwealth is this, that the police made a search of the car in which the fruits of the crime was found without a warrant. Aside from the fact that this was an incident to a lawful arrest, we have the fact that the car which was searched, was not the car of this defendant, but was the car of a third person, that third person being one of the accomplices. I believe that that contention is without merit.

The next contention is a more troublesome one, Your Honor. There was a gun and cartridges found in the car, but the police did not content themselves with that. They searched the home of this defendant and in that home, they found other cartridges which were—had nothing, really, to do with this crime, but which was used as evidence during the course of the trial.

Now, as happens with local police, I think this was the North Braddock police, they testified at the trial and it appears in the record, that they did have a warrant to search the home of this defendant, that that warrant had been lost and it was not offered in evidence, but [fol. 7] the testimony and the record will show that there had been a warrant and that it was not produced at the time of the trial.

Now, that would be a fact, I believe, for the state courts to determine and Judge Graff has made that determination. However, we are concerned with this problem.

The search warrant did not, according to the police officer who testified on cross examination, specify with particularity the items which authorized the search. It was a general blanket warrant. Any evidence that might connedct this defendant with the crimes with which he was charged.

The real question is whether or not the warrant, if it were before us and which showed that it lacked specificity, would invalidate the fruits of that, would render inadmissible the fruits of that search and whether the use of the evidence was so prejudicial to this defendant that but for it, it would have resulted in his acquittal.

Now, this evidence was pure surplusage. I can not tell Your Honor why the District Attorney offered that evidence. It was absolutely superfluous. No need to do it but he did. There was abundant evidence other than that.

THE COURT: Was there an objection?

[fol. 8] MR. ABROMSON: Not only—there was an objection but here's the difficulty that we find and if Your Honor has read Judge Graff's opinion, Judge Graff, aside from other conclusions, held that it was incumbent on this defendant to file a motion to suppress the evidence, the existence of which the defendant knew.

He knew that this home had been searched and that this evidence was seized and that the failure of this defendant who was represented by counsel—I don't remember who counsel was, Your Honor—to file this motion, precluded him from raising the question after his conviction.

That is our position in connection with this rather troublesome question.

THE COURT: But there was an objection at the trial?

MR. ABROMSON: I can't answer that accurately. If Your Honor would permit me to look at the record—

THE COURT: That's all right, go on.

MR. ABROMSON: Your Honor, apparently there was an objection and the Court overruled it.

THE COURT: What page?

MR. ABROMSON: The testimony relative to the Defendant Chambers begins on page 194 and I note on page 197, the statement of the District Attorney:

"We will offer these Exhibits 6 and 7 in evidence."

[fol. 9] "The Court: There is an objection, but it is overruled and an exception noted."

Now, I don't know, I don't remember whether Judge Graff in his opinion held that the warrant did exist and it was sufficient to authorize the search, even though it may have lacked specificity or—that must be the reason why he overruled it or whether because they failed to raise the question before trial.

Under our courts of criminal procedure, and I believe the federal criminal rules so provide too, a motion to suppress must be filed within five days prior to the date of trial.

In this case, our rules of criminal procedure had not been adopted at the time of this trial but Judge Graff held that the federal rules should be applied to the state courts as well.

THE COURT: How would a state lawyer know that?

MR. ABROMSON: Independent of the rules of criminal procedure, Your Honor, in our state courts, hundreds of petitions have been filed to suppress confessions, evidence, as a result of an illegal search and so forth and even long before Mapp against Ohio, in our state courts, the counsel would present those petitions where they had a basis for it.

We have the unfortunate situation where some of our [fol. 10] local borough police or township police, are not too methodical and there was testimony that there was a warrant here.

How can this court or the state court determine whether or not the warrant was so very vague and so very uncertain as to render it wholly invalid?

The warrant may have read, to find any evidence in connection with the crime which had been committed, but the officer could not recall the exact language of it and his testimony, Your Honor, appears on page—well, it's on the same page shortly before that, the testimony of Officer Cicco of the Borough of North Braddock.

May I refer to page 199 of the transcript, Your Honor? This is counsel objecting to the testimony. It says:

> "Your Honor, I renew my objection to the admission of the bullets in evidence. The search warrant does not indicate any reasonable ground for the officers to come into Chambers' house and take the bullets. It has to set forth in the search warrant specifically what they are looking for and show reasonable reason why they should go into his house. They were just out there searching for anything they could find. There is nothing set down in any way that indicates they were looking for bullets. I

[fol. 11] feel it is grossly unfair to let the bullets in evidence and I renew very strongly my objection and I ask that all the testimony be stricken from the record.

"The Court: Well of course, you have known about this from the other trial three weeks ago.

"Mr. Tamburo: I wasn't the attorney at the other trial.

"The Court: But you knew about it?

"Mr. Tamburo: I didn't know a thing about the search warrant until this morning.

"The Court: You knew about the evidence about to be introduced. You told me about it.

"Mr. Tamburo: It wasn't admitted.

"The Court: That doesn't mean I have to exclude it now. You have not conformed to the rules of the Superior Court with the suppression of evidence. There are recent rulings by the Superior Court which says what you have got to do. You haven't done it. I think there is reasonable ground for making a search here, even without a warrant and that's also a preliminary matter. We overrule the objection and allow an exception."

[fol. 12] Now, of course—

THE COURT: Was there an appeal taken in this case?

MR. ABROMSON: A direct appeal? No, Your Honor, but the question was considered by our Superior Court and the opinion is not a very lengthy one. It is before Your Honor, I think, among the papers, the opinion of the Superior Court.

THE COURT: Yes.

MR. ABROMSON: Now, aside from the lack of specificity, we have this question. Although concededly there is some measure of remoteness both as to time and place, this search was made the following morning, not at the place of the arrest but at the defendant's home.

Now, my argument may be in vaid but here was a known criminal with a record a mile long, the defend-

ant. The police knew of his prior criminal record. They had ample and probable cause for the arrest.

Was it too remote in time and place, even if there no warrant at all? There was a warrant here, but assuming there were no warrant, was it not a proper search of his home even though it was made the next morning and some miles away from the place of arrest?

I am fully aware of the Third Circuit Court decisions, [fol. 13] which say that even an hour is too remote in time and the mile is too remote in distance. I am familiar with those decisions, but here you have a somewhat different situation. You have a man who is known to have had a long criminal record who has been in jail most of his life and guns were used and they had probable cause to believe that there might be other ammunition or other guns in his home and even if there were no warrant of any kind, the police might have been justified to protect the public in trying to seize those guns. This is contraband bullets and guns.

THE COURT: He had not gotten home after the robbery of the station wagon?

MR. ABROMSON: No, he had not, Your Honor. I frankly concede that my argument is not a very forceful one, but it is not to be put aside completely either. There's some merit to it.

Suppose there were no warrant? Suppose they had cause to believe that in this home, there was contraband. You've got to bear in mind this is not the fruit of the crime. This is the means, the instrumentality with which crimes are committed.

If I have, if an officer has probable cause to believe that there is contraband or guns which could be detrimental to the community, is it absolutely imperative that he secure [fol. 14] a warrant?

THE COURT: Well, he did secure a warrant.

MR. ABROMSON: He did secure a warrant, but the warrant lacks specificity.

THE COURT: So we have a case where he got a warrant. Now the question is, does a general search warrant justify admitting something in evidence? What do you say about that?

MR. ABROMSON: Well, I say that under the circumstances in this case, knowing the record of this man, having found the bullets and the gun in the car, having more than probable cause to believe that he committed the robbery both of the Gulf gasolene station and of the McKeesport gasolene station, that he couldn't know exactly what he was looking for, that he was looking for some evidence of the means with which this crime was perpetrated and how the warrant read, I don't know.

Let us assume it read for guns or other means of committing the—or used in the commission of crimes.

THE COURT: How long prior to the Gulf robbery did the McKeesport robbery occur?

MR. ABROMSON: I have that specified, Your Honor. On March 20, 1963, the Gulf station was robbed. May 13, 1963, seven days prior thereto.

[fol. 15] THE COURT: I thought you said March 20, 1963.

MR. ABROMSON: On May 20, 1963 the Gulf.

THE COURT: May 20.

MR. ABROMSON: May 20, 1963.

THE COURT: Now, does anyone, does the record show that someone told the officers that this defendant had participated in the McKeesport robbery?

MR. ABROMSON: They found in the McKeesport robbery had been reported to the police in the neighborhood. What was taken was a wallet from an attendant. In that wallet, there were certain cards, credit cards, American Legion, whatever it was.

When the Gulf robbery took place and the car was apprehended, they found in this car, the card which had been taken in the McKeesport robbery and that robbery occurred a week before the Gulf robbery, approximately a week.

THE COURT: So they suspected that the same occupants of the car also participated in the McKeesport robbery a week before?

MR. ABROMSON: Oh yes.

THE COURT: Because they found the wallet?

MR. ABROMSON: Oh yes. There isn't any question about that.

THE COURT: So isn't that probable cause to get [fol. 16] a warrant. They got the warrant. What in the world would they be looking for? They had the evidence.

MR. ABROMSON: They may have been looking for the fruits of the earlier robbery.

THE COURT: Well, they the wallet.

MR. ABROMSON: They had the wallet, but there was money missing too. There were other items in addition to that.

THE COURT: What other items did they find?

MR. ABROMSON: Money it was. The problem is and in fairness to this defendant and for the sake of accuracy, I don't know whether the officers went to the home of Chambers before they knew of the McKeesport robbery.

THE COURT: Well, they searched the car before they went to the home.

MR. ABROMSON: Oh yes, yes.

THE COURT: And you say that they did find this wallet in the car?

MR. ABROMSON: Yes, Your Honor.

THE COURT: You think that they connected the occupants of the car up with the McKeesport robbery before they'd go into anybody's home the next morning.

MR. ABROMSON: What I don't know is whether the officers had ascertained what was missing, other than the [fol. 17] cards from the McKeesport robbery. If they went there, without knowing what they were looking for at all, just a general fishing expedition, I am afraid even if there was a warrant, we might be in deep trouble, but you see that does not appear in the record.

THE COURT: You see, our rule, getting back to the federal rules, which I think is 41 (e), "A person aggrieved by an unlawful search and seizure may move the District Court for the return of the property and to suppress for use as evidence anything so obtained on the ground that 1, the property was illegally seized without warrant or 2, the warrant is insufficient on its face or 3, the property seized is not that described in the warrant or 4, there was not probable cause for believing the existence of the grounds on which the warrant was issued or 5, the warrant was illegally executed.

"The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored, unless otherwise subject to lawful detention," like if it were dope, liquor.

MR. ABROMSON: Or a gun.

THE COURT: Is a gun contraband?

MR. ABROMSON: Yes, it is.

[fol. 18] THE COURT: "And it shall not be admissible in evidence at any hearing or trial."

Now, "The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion, may entertain the motion at the trial or hearing."

All of which puts us in great dilemma when our federal defendants have not made a prior motion to dismiss and then their counsel makes it at the trial.

Generally, we have to let the jury go and hear a complicated motion to dismiss, suppress.

MR. ABROMSON: Well, we have run into that problem in our courts too. Our Rules of Criminal Procedure provide a motion shall be filed within five days. I think that our appellate courts have said that if the motion is not filed within five days, the Court below, in its discretion, may determine whether or not the defendant is so prejudiced by a failure to file a motion as to require in good conscience a hearing be granted on that issue.

But we have got to bear in mind, this is not the fruit of a crime and whether or not there be a distinction, I don't [fol. 19] know. This is not the fruit of the crime. This is the instrumentality that was found. It is the means of a crime. It was contraband.

Does the defendant have any property rights in guns, bullets? We have got to bear in mind this one important fact. This Chambers, this petitioner, was a convict.

Our statute provides that the possession of a gun which would carry with it bullets, I am quite sure, is forbidden to be had by a—that a convict, one having a prior criminal record, is not permitted to have possession of firearms.

Now, if the nature of the evidence seized is contraband, which defendant had no right to have in his possession, is the same rule applicable?

THE COURT: Do you have a citation for that statute?

MR. ABROMSON: No, sir, I have not. Oh, you mean the statute with respect to the firearms?

THE COURT: Yes.

MR. ABROMSON: Oh yes. That's in 18 Purdon's statutes, under the Uniform Firearms Act. I don't remember it by hand, but if Your Honor has 18 Purdon's.

THE COURT: I may have. I don't know if I have [fol. 20] the right one.

MR. ABROMSON: Under the Uniform Firearms Act.

THE COURT: Any index in that?

MR. ABROMSON: Uniform Firearms Act, 18 Purdon's Statute, 4628, sub-section (b) reads as follows:

"No person who has been convicted in this Commonwealth or elsewhere of a crime of violence shall own a firearm or have one in his possession or under his control."

This man was convicted of numerous crimes of violence.

THE COURT: I don't know whether it goes so far as possession of bullets or not.

MR. ABROMSON: Well, that is the question but if it's illegal for him to have a gun, with which he could commit harm, certainly the tool or the means with which that gun could commit the shooting, certainly it would be included in that in my opinion, but the real question—

THE COURT: You have an opinion?

MR. ABROMSON: Beg pardon?

THE COURT: You have no court opinion?

MR. ABROMSON: No, unfortunately not, but the real question is whether the nature of the evidence that was seized under a general warrant, would make any difference and I think our courts have drawn a distinction [fol. 21] between the fruits of a crime and the instrumentality of a crime. There's a recent decision on that. I don't have it.

THE COURT: You haven't cited it.

MR. ABROMSON: I beg your pardon?

THE COURT: If you haven't cited that recent decision, will you?

MR. ABROMSON: I will be glad to, yes.

THE COURT: It's hard enough for me to keep up with the federal decisions without also keeping up with the decisions—

MR. ABROMSON: Yes.

THE COURT: I may have to grant a hearing on this. I don't know.

MR. ABROMSON: Well, I will submit that decision.

THE COURT: Thank you.

MR. ABROMSON: I'd like the opportunity of submitting that decision to you. I don't know whether it will have any direct bearing on the issue here, but there is an important distinction between the the fruits of the crime and the instrumentality of crime, particularly when the gun is forbidden by statute if the owner has a prior criminal record.

THE COURT: Well, I think Judge Graff decided it [fol. 22] correctly but—

MR. ABROMSON: The reasons. The reason may not be sufficient. I don't know. He relied, if you have the opinion before you, primarily—

THE COURT: Yes, I did read it.

MR. ABROMSON: Yes.

THE COURT: But I just read it so long ago that I am not sure I remember everything.

My impression was it's sufficient.

MR. ABROMSON: I don't know whether this more recent case of our United States Supreme Court, distinguishing between the fruits of a crime and a instrumentality will have any bearing or not, but I'd like to submit it to Your Honor.

THE COURT: Yes. I think it will help the Commonwealth out.

MR. ABROMSON: I think it should, yes.

[Reporter's Certificate (Omitted in Printing)]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 67-1050

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

OPINION AND ORDER

MARSH, District Judge.

Relator has filed in this court a petition for a writ of habeas corpus. It appeared from the petition that all state remedies had been exhausted. On the basis of the petition, a rule issued to show cause why an evidentiary hearing should not be granted. At the hearing the District Attorney submitted documents required under Local Rule 16(g). Based on the records submitted, the court is of the opinion that the rule should be discharged and the petition for writ of habeas corpus denied.

Relator was charged in two indictments for armed robbery and receiving stolen goods. The indictments resulted from the occurrence of two armed robberies of gas stations, one in the early morning of May 13, 1963,[1] and the other on the night of May 20, 1963.[2]

At trial relator was found guilty by a jury on all counts of both indictments and was sentenced to imprisonment for a total term of 6 to 15 years.[3] In his

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[1] Indictment at No. 78 June Sessions, 1963; armed robbery (first count); receiving stolen goods (second count).

[2] Indictment at No. 91 June Sessions, 1963; armed robbery (first count); receiving stolen goods (second count).

[3] Relator was sentenced at No. 78 June Sessions, 1963 to imprisonment for not less than 4 nor more than 8 years, and at No. 91 June Sessions, 1963 to a consecutive term of not less than 2 nor more than 7 years.

petition relator raises a number of contentions with respect to the manner in which the arrest was made and the manner in which certain evidence admitted at trial was obtained.

Relator contends that his constitutional rights were violated when the trial court admitted into evidence over two objections certain .38 caliber bullets which were seized during a search with a warrant of relator's home. Irrelevancy was the basis of the first objection, and lack of reasonable ground and failure to specify the items to be seized in the search warrant were the reasons for the second objection.

The trial Court overruled the objection to the deficiency of the search warrant on the ground that proper procedure with respect to suppression of evidence had not been followed (T., pp. 200-201). The procedure followed in Pennsylvania before the effective date of the pertinent Rules of Criminal Procedure required that any attack on allegedly illegally obtained evidence be made prior to trial. Of course, defense counsel must have a reasonable opportunity to conform to the procedure and if this opportunity does not exist, objection at trial would be proper. At a previous trial which ended in a mistrial, objection to the admission of the bullets was sustained (T., p. 115). Counsel who represented relator at the prior trial was different from his counsel at the latter trial which resulted in the conviction, although both were members of the Legal Aid Society of Allegheny County. Further, there is evidence tending to show that relator's counsel had no knowledge of any possible impropriety in the manner in which the bullets were seized until the time when they were offered (T., p. 200). Even if this counsel had the opportunity to utilize pre-trial procedure prior to the second trial, he was misled by the exclusion of the bullets at the prior trial into believing that upon objection they likewise would be excluded at the second trial.

It seems that subsequent to trial the search warrant was lost. Thus, no opportunity exists to determine from inspection whether it was in fact defective. Whether the trial Judge, who probably saw the search warrant and

admitted the bullets in evidence, thought it was valid does not explicitly appear. However, even if we assume that the warrant was defective[4] and that the search and seizure were unlawful, therefore causing the admission at the trial of the seized bullets to constitute constitutional error, nevertheless, it is not sufficient to entitle relator to relief if the error was harmless. Not all error that is committed during a trial is harmful. The test for determining whether error is harmless or not was formulated by the United States Supreme Court in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The Court held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Using this test a court is justified in denying habeas corpus relief if it finds from the trial record as a whole that the error was harmless. *Young* v. *Boles*, 270 F. Supp. 847, 849 (N.D. W.Va. 1967). A review of the entire trial record convinces this court that the alleged erroneous admission of the .38 caliber bullets was harmless beyond a reasonable doubt.

Relator was identified by the victim in court as one of the two perpetrators of the armed robbery which occurred on May 13, 1963. Relator was also identified at a lineup. The victim who formerly had been a police officer testified he had an opportunity to observe closely the facial features of the robber he identified (T., p. 9). He further testified that the robber had a .38 caliber revolver that was "sort of nickel-plated * * * [and] pretty well marred up * * *" (T., p. 10). He identified Commonwealth Exhibit 1 as appearing like the gun that was used. In addition to the money seized, the victim testified that his wallet containing four personal cards with his name on them was taken. This wallet and cards were admitted in evidence (Commonwealth Ex. 2).

The cumulative effect of the evidence concerning the second robbery which occurred on May 20, 1963, also

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[4] There is testimony in the record that the search warrant did not specify the bullets as items to be seized (T., p. 203; see also T., p. 199).

establishes that relator was one of the perpetrators. There was testimony of two teenagers that a blue station wagon with four Negro occupants was seen in a parking lot located near the gas station, was seen circling the block prior to the robbery, and that immediately after the robbery it was seen leaving the area at a great rate of speed. One of the teenagers testified that one of the occupants of the car was wearing a green sweater.

The operator of the gas station related that while outside of the building he was approached by two men. One of the men showed a gun, and the operator and the two men proceeded into the building. In the building both of the men pulled out guns and the operator opened the cash register. Bills and change were removed and the change was placed in a right-hand glove which belonged to the operator (T., pp. 66-67). Commonwealth Exhibits 1 and 3 were identified by the operator as resembling the guns used and the glove marked as Commonwealth Exhibit 4 was identified as the glove used to carry the change. The operator further testified that one of the robbers was wearing a "green pull over sweater".[5]

The North Braddock police investigated the robbery and relayed the information concerning the blue station wagon to neighboring police departments. Based on this information, the Swissvale police within an hour after the robbery stopped a blue station wagon, in which relator was one of the occupants. The North Braddock police arrived and the relator and the vehicle[6] were taken immediately to the North Braddock police station. Lieutenant Wagner of the North Braddock police testified that relator was wearing a green V-neck sweater. Further testimony showed that the vehicle was searched at the police station and in a ventilator under the dash-

[5] The day after the robbery the victim was able to identify relator as one of the robbers but at trial a positive identification of relator could not be made because, as the victim explained, the dress of the relator was not the same and the relator did not have glasses or a mustache.

[6] The blue station wagon was owned by one of the codefendants, Raymond Lawson.

board two .38 caliber revolvers, a glove full of change and two operator's licenses and other cards bearing the name of the victim of the first robbery were found. These items were admitted into evidence as Commonwealth exhibits.

In the light of the eyewitness identification of the relator, the recognition of the revolvers, the glove full of change, and the personal cards found in the station wagon, and the factor of the green sweater, we are convinced that beyond a reasonable doubt the alleged error committed in the admission of the .38 caliber bullets was harmless.

Relator further claims that there was no probable cause for his arrest and, therefore, his arrest without a warrant was unlawful. A lawful arrest without a warrant can be made if probable cause exists for making it. Probable cause is found to exist where police officers through reliable information have knowledge of facts and circumstances which are sufficient to cause a man of reasonable prudence to believe that a crime has been committed. *McCray* v. *Illinois*, 386 U.S. 300, 304 (1967); *Ker* v. *California*, 374 U.S. 23, 34-35 (1963).

The information within the knowledge of the Swissvale police furnished the ground for a reasonable belief that relator had been involved in an armed robbery. They had received information by radio concerning the robbery in North Braddock and they were alerted to watch for a light blue compact station wagon containing four Negro occupants. A vehicle answering the description was spotted. The officers verified the information they had and stopped the vehicle. The occupants, one of whom was relator, were taken into custody. We believe that these facts and circumstances form the basis for probable cause and a legal arrest.

A claim is also made by relator that the search of the vehicle at the police station without a warrant was a violation of his constitutional right under the Fourth Amendment. The prohibition against unreasonable search provided by the Fourth Amendment is made applicable to the states by virtue of the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The reasonableness

of the search is determined on an ad hoc basis as measured by the federal standard. *Ker* v. *California, supra.* A search can be made without a warrant if conducted incident to a lawful arrest, *Ker* v. *California, supra,* and is reasonable under the circumstances. Having found that the arrest was lawful, it follows that the search was reasonable and incident to the arrest.

Relator was taken into custody based on information that an armed robbery had been committed. The nature of an armed robbery contemplates converted property and the instrumentalities used in commission of the crime. In the circumstances, it was proper to search for these items.

At the time the arrest was originally made, darkness would have prevented any search from being effective; therefore the search at the police station under more favorable conditions was permissible. *United States* v. *Dento,* 382 F. 2d 361 (3d Cir. 1967). The Pennsylvania courts when confronted with similar facts have held that the search was reasonable. *Commonwealth* v. *Cockfield,* 411 Pa. 71, 190 A. 2d 898 (1963); *Commonwealth* v. *Czajkowski,* 198 Pa. Super. 511, 182 A. 2d 298 (1962).

The contention that relator's counsel was not competent is without merit. *In re Ernst's Petition,* 294 F. 2d 556 (3d Cir. 1961); *United States ex rel. Peterson* v. *Russell,* 266 F. Supp. 93, 95 (W.D. Pa. 1967).

An appropriate order will be entered.

ORDER OF COURT

AND NOW, to-wit, this 6th day of March, 1968, after careful examination of the petition for writ of habeas corpus and the answers filed, and the pertinent records in this case submitted by the District Attorney pursuant to Rule 16(g) of this court, IT IS ORDERED, ADJUDGED AND DECREED that the Rule to Show Cause be and the same is hereby discharged, and the petition for writ of habeas corpus be and the same hereby is denied.

In my judgment there is probable cause warranting an appeal for the reason that judicial opinion may reasonably differ with respect to the admission of the bullets in evidence.

/s/ Rabe F. Marsh
United States District Judge

cc:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 67-1050

UNITED STATES OF AMERICA, EX REL. FRANK CHAMBERS

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

ORDER OF COURT

AND NOW, to-wit, this 11th day of March, 1968, IT IS ORDERED that the Opinion in the above entitled case, dated March 6, 1968, be amended as follows: The sentence beginning with "However", ninth line, page 3, be and the same hereby is deleted, and the following sentence substituted therefor: "However, even if we assume that the warrant was defective[4] and that the search and seizure were unlawful, therefore causing the admission at the trial of the seized bullets to constitute constitutional error, nevertheless, it is not sufficient to entitle relator to relief if the error was harmless." On page 5, second line of last paragraph, insert words "without a warrant" after the word "arrest; on page 5, third line of last paragraph, insert the words "without a warrant" after the word "arrest".

/s/ Rabe F. Marsh
United States District Judge

cc:

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GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Case No. 17,219

UNITED STATES OF AMERICA, EX REL,
FRANK CHAMBERS, APPELLANT

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

APPEAL FROM WESTERN DISTRICT OF PENNSYLVANIA

Attorneys for Appellant
Pro Se

Attorneys for Appellee

CHARLES B. WATKINS

No. below: Civil Action No. 67-1050
Judge below: Rabe F. Marsh
Date of Judgment:
Notice of appeal filed: March 13, 1968

DATE	ACCOUNT OF APPELLANT
1968	
Apr. 5	Forma Pauperis (D.C.)

DATE	FILINGS—PROCEEDINGS
1968	
Apr. 5	(Copy of order, dated March 13, 1968, by Rabe F. Marsh, U.S.D.J. "permitting" appellant leave to appeal in forma pauperis, filed.)
	(For certificate of probable cause see opinion of Judge Marsh in record (paper No. 10) and entry on D.C. docket entries of March 6, 1968 stating "there is probable cause warranting an appeal from the reason that judicial opinion may reasonably differ with respect to the admission of the bullets in evidence)
	Copy of "Informal" Notice of Appeal, rec'd. March 18, 1968, filed.
	Record, rec'd. March 18, 1968, filed.
Apr. 5	Petition by appellant for release on bail (rec'd. 3/22/68) and for appointment of counsel (rec'd. 3/29/68), filed. (5 copies of petition for bail and 4 copies of petition for appt. of counsel).
Apr. 11	Appearance of Charles B. Watkins, for appellee, filed.
Apr. 15	Submitted on appellant's motion for appointment of counsel and for release on bail and (for leave to file typewritten briefs). Coram: McLaughlin, Freedman and Seitz, Circuit Judges.
Apr. 24	Order (*McLaughlin*, Freedman and Seitz, Circuit Judges) granting appellant leave to file typewritten briefs and appendix and denying applications for appointment of counsel and for release on bail, filed.
Apr. 24	Certified copy of above order to Clerk of District Court.
Apr. 24	Brief for appellant, filed. (rec'd. April 1, 1968). (5 handwritten copies).
May 1	Brief and appendix for appellee, filed.

DATE	FILINGS—PROCEEDINGS
1968	
May 4	Petition by appellant for Reconsideration of this Court's order of April 24, 1968, filed. (4 handwritten copies).
May 7	Submitted on appellant's petition for reconsideration of this Court's order of April 24, 1968. Coram: McLaughlin, Freedman and Seitz, Circuit Judges. See letter of 5/7/68.
May 2	Affidavit of mailing of appellee's brief and appendix on April 30, 1968, filed.
May 13	Order (*McLaughlin*, Freedman and Seitz, Circuit Judges) denying appellant's petition for reconsideration of this Court's order of April 24, 1968, filed.
Nov. 7	Submitted on briefs. Coram: Kalodner, Forman and Stahl, Circuit Judges.
Nov. 22	First supplemental record (Record of the Court of Common Pleas of Allegheny County, Pa. at No. 1988 January Term 1966 [Commonwealth of Pa. ex rel. Frank Chambers vs. Robert W. Duggan, D. A. of Allegheny County, Pa., et al.]), filed.
1969	
Jan. 22	Opinion of the Court (Kalodner Forman and *Stahl*, Circuit Judges), filed.
Jan. 22	Judgment affirming, with costs, the order of the District Court, filed March 6, 1968, filed.
Feb. 1	Petition for rehearing by appellant, filed. (3 handwritten copies).
Mar. 17	Order (Hastie, Chief Judge, and Kalodner, Forman, Freedman, Seitz, Van Dusen, Aldisert and *Stahl*, Circuit Judges) denying petition for rehearing.

DATE	FILINGS—PROCEEDINGS
1969	
Mar. 26	Notice of filing petition for writ of certiorari rec'd from Clerk of Supreme Court of United States (S.C. No. 1781 Misc. O.T. 1968), filed.
Apr. 7	Certified Judgment in lieu of formal mandate, issued.
Apr. 7	Record returned to Clerk of District Court.
Apr. 9	Receipt for record rec'd from Clerk of District Court, filed.
Apr. 16	First supplemental record returned to Clerk of District Court.
Apr. 21	Receipt for first supplemental record rec'd from Clerk of District Court, filed.
Nov. 18	Certified copy of order dated November 10, 1969 rec'd from Clerk of Supreme Court of the United States granting motion to proceed in forma pauperis; and granting petition for writ of certiorari. The case is transferred to the appellate docket as No. 830 and placed on the summary calendar, filed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17219

UNITED STATES OF AMERICA, EX REL,
FRANK CHAMBERS, APPELLANT

v.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted November 7, 1968

Before KALODNER, FORMAN and STAHL, *Circuit Judges*

OPINION OF THE COURT

(Filed January 22, 1969)

STAHL, *Circuit Judge*

Appellant Chambers, having exhausted his state remedies, unsuccessfully sought a writ of habeas corpus in the district court.[1] No evidentiary hearing was held below. This appeal followed.

In his petition, appellant alleged that his state convictions on charges of armed robbery and receiving stolen

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[1] The opinion of Judge Marsh in the court below is reported at 281 F. Supp. 96 (W.D. Pa. 1968).

goods [2] were constitutionally defective for a number of reasons:

(1) There was no probable cause for his arrest;
(2) The search of the car in which he was a passenger at the time of his arrest was invalid on the ground that it was made without a warrant and was not incident to the arrest, even if the arrest was lawful;
(3) The search of his home was invalid, even though a search warrant had been obtained, because the warrant did not describe the product of the search which was admitted in evidence; and
(4) "The belated appointment of counsel rendered his services ineffective in that he was delegated to represent petitioner en route to the courtroom the day of the trial." [3]

The district court concluded that the first three grounds did not violate appellant's constitutional rights.

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[2] While on parole from a prior conviction, appellant took part in two armed robberies of gas stations, one on May 13, 1963, in McKeesport, Pa., and the other on May 20, 1963, in North Braddock, Pa. He was found guilty by a jury and sentenced to a term of four to eight years for the May 13 charges and to a term of two to seven years for the other charges. The first sentence was to be served concurrently with another sentence for an unrelated armed robbery offense imposed earlier [Commonwealth v. Chambers, 209 Pa. Super. 709, 224 A.2d 371 (1966), vacated by State Supreme Court and further appellate proceedings pending]; the two to seven year term of imprisonment was to be served consecutively to the other sentences. There was no direct appeal from these convictions.

The issues raised by appellant relate to the convictions for both the McKeesport and North Braddock offenses.

The answer filed in the state court habeas corpus proceeding by the Superintendent of the State Correctional Institution in Pittsburgh indicates that because these offenses constituted a parole violation requiring appellant to serve first the time remaining on a prior conviction, he may not begin serving the new sentences which he challenges until the end of January, 1969. This fact does not foreclose the present habeas corpus application, of course, Peyton v. Rowe, 391 U. S. 54 (1968), having abolished the prematurity doctrine. *See also* United States *ex rel.* Van Scoten v. Pennsylvania, —— F.2d —— (3d Cir. 1968).

[3] From petitioner's pro se brief.

With respect to the Sixth Amendment claim of ineffectiveness of counsel, the court said that this "contention . . . is without merit," citing In re Petition of Ernst, 294 F.2d 556 (3d Cir. 1961), and United States *ex rel.* Peterson v. Russell, 266 F. Supp. 93 (W.D. Pa. 1967).[4] The same contention as to ineffective counsel had been made in the habeas corpus proceeding in the state court[5] and was rejected in an opinion, dated December 2, 1966,[6] by Judge Graff, who had also been the trial judge.

We would dispose of this appeal on the well-reasoned opinion of Judge Marsh below were it not for the fact that following the date of that opinion (March 6, 1968), we established for the first time a definite standard for determination of the issue of ineffective counsel in belated appointment cases: United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (May 7, 1968). In a supplemental brief filed by appellant, he relies directly on *Mathis* for the requested relief. Neither the lower state court opinion nor the decision below discussed specifically the late appointment aspect of appellant's petitions.

Prior to *Mathis* this court had not dealt expressly with the issue of burden of proof where the claim of ineffective counsel was bottomed on hasty appointment.[7] In

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[4] *Ernst* was not a belated appointment case. In *Peterson* there was an allegation of belated appointment, and the district court in an opinion by Judge Marsh concluded from "the entire record" that there was no resulting prejudice to petitioner.

[5] Appellant said in his state petition: "Defense counsel being appointed the same day of trial without time to investigate and prepare the case nor even consult with the accused is a denial of due process."

[6] Commonwealth *ex rel.* Chambers v. Duggan, No. 1988 January Term, 1966, Court of Common Pleas of Allegheny County, Pennsylvania, *aff'd per curiam*, 210 Pa. Super. 718, 231 A.2d 336 (1967), allocatur denied by the Supreme Court at No. 2193A Miscellaneous Docket, July 21, 1967.

[7] In United States v. Helwig, 159 F.2d 616 (3d Cir. 1947), a federal criminal proceeding, we granted relief where the record showed that the defendant's counsel was appointed one minute before trial and defendant contended he was thereby denied sufficient time to prepare for trial. There was no discussion of whether the defend-

Mathis,[8] following the lead of the Fourth Circuit,[9] we

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ant had the burden of showing prejudice. Judge Biggs did conclude the opinion by stating: "It is notable also that the appellee [the United States] does not contend that Helwig was awarded due process of law guaranteed to him by the Fifth Amendment." Perhaps this comment presaged the *Mathis* holding that late appointment is inherently prejudicial and absence of prejudice must be proved by the prosecution.

Relying, *inter alia*, on *Helwig*, United States v. Vasilick, 206 F. Supp. 195 (M.D. Pa. 1962), granted a new trial where counsel was appointed moments before trial even though there was no clear proof of prejudice made out by the defendant.

In another late appointment case, United States *ex rel.* Tillery v. Cavell, 294 F.2d 12 (3d Cir. 1961), in remanding the case to the lower court, we said:

> The finding of fact that "counsel had not been appointed until the day of trial, . . ." was too limited and there should be explicit findings of fact that lead to the conclusion that counsel was unable to effectively represent Tillery otherwise than only from his being appointed on the trial day. 294 F.2d at 22.

In several more recent district court decisions in this Circuit prior to *Mathis*, where it was charged that counsel was appointed too close to the time of trial to become familiar with the case, it was stated that the "time of appointment of counsel, in itself, does not establish ineffective assistance." United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 700 (E.D. Pa. 1967), *aff'd per curiam*, —— F.2d —— (3d Cir. 1969), where we held, after *Mathis*, that in the evidentiary hearing below the state had rebutted any presumption of injury; United States *ex rel.* Kelley v. Rundle, 242 F. Supp. 708 (E.D. Pa.), *aff'd per curiam*, 353 F.2d 214 (3d Cir. 1965).

[8] In *Mathis*, the trial counsel, a voluntary defender, was assigned to the case by his office the night before the trial. His trial preparation involved review of the notes of a colleague, who had previously interviewed the petitioner in that case, as well as a half hour meeting with witnesses prior to the trial. In Judge Weiner's opinion, he noted that counsel was hard pressed to assure a conscientious defense, but he concluded, from the facts of the case and from counsel's inability to say in his testimony in the habeas corpus proceeding in the district court that he had been insufficiently prepared to go to trial, that the prima facie presumption of denial of effective representation due to belated appointment (discussed *infra*) was effectively rebutted.

[9] Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966).

[Footnote continued an page 324]

said that the belated appointment of counsel is inherently prejudicial and makes out a prima facie case of denial of effective counsel, with the burden of proving absence of prejudice shifted to the prosecuting authorities.

At first blush it would appear that only an evidentiary hearing, in which the state adduces the testimony of the trial counsel and other evidence to rebut the taint of prejudice, can be sufficient to overcome the prima facie presumption of ineffective counsel. A closer examination of the full scope of the Fourth Circuit rule we have chosen to follow discloses that denial of effective repre-

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[9] [Continued]

While the United States Supreme Court does not appear to have considered the precise question of burden of proof of prejudice in belated appointment cases, the whole concept of timely and effective representation by counsel stems, as we pointed out in *Mathis*, from Powell v. Alabama, 287 U.S. 45 (1932), where Justice Sutherland said that the "duty [to appoint counsel] is not discharged by an assignment *at such time* or under such circumstances to preclude the giving of effective aid in the preparation and trial of the case." *Id.* at 71. (Emphasis added.)

In Avery v. Alabama, 308 U.S. 444, 446 (1940), the Court said:

> Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied, does not constitute a denial of the constitutional right to assistance of counsel. . . .
>
> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. . . .

The Court held in *Avery* upon a review of the record that the trial court's denial of the motion for continuance was not a deprivation of the constitutional right to assistance of counsel.

Martin v. Virginia, *supra* at 551, n. 3, cites language in Estes v. Texas, 381 U.S. 532 (1965), in support of the inherent prejudice rule. The Supreme Court said there, in another context:

> It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. . . . 381 U.S. at 542-543.

sentation may also be refuted where the "record" contains "adequate *affirmative* evidence to overcome the presumption of harm from the lack of time for preparation" [10] by appointed counsel: Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967).[11] We construe this to mean that the prima facie ineffectiveness or the inherent prejudice due to late appointment of counsel may properly be overcome *either* by evidence produced by the state in an evidentiary hearing showing that there was no prejudice *or* by adequate affirmative proof *otherwise* appearing in the record demonstrating that the appellant was not prejudiced. We believe this is a logical approach which is fair to a petitioner seeking relief and at the same time comports with sound judicial administration.

The alternative methods of negating the prima facie harm from a belated appointment are of particular importance in the present case because the Commonwealth made no attempt in either the state or federal habeas corpus proceeding (as *had* been done in *Mathis*) to produce evidence showing that the appellant was not prejudiced by the late appointment of counsel.[12] Therefore,

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[10] Emphasis in original.

[11] This element of the rule in the Fourth Circuit is still in effect. See Harris v. Peyton, 285 F. Supp. 107 (W.D. Va. 1968).

[12] The fact that the Commonwealth did not attempt to produce such evidence, as by calling the counsel who was belatedly appointed as a witness, is understandable. In the first place, at least in the state proceeding, appellant seemed to have abandoned his ineffective counsel claim. See text at note 18, *infra*. Secondly, the *Mathis* rule was not in effect at that time, and the Supreme Court of Pennsylvania as late as November 14, 1967, following Commonwealth *ex rel.* Dion v. Tees, 180 Pa. Super. 82, 118 A.2d 756 (1955), had expressly rejected the burden of proof formula in belated appointment cases as developed in the Fourth Circuit. In Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 607-608, 235 A.2d 349, 354 (1967), the Court said:

> Appellant asserts that counsel's lack of time to confer and prepare is inherently prejudicial and that, combined with three alleged trial errors, must result in a finding of ineffective assistance of counsel. The problem of the hastily appointed or insufficiently prepared attorney is one of first impression for this Court. Appellant insists, citing Fields v. Peyton, 375

this court must either find from an examination of the record before us that there is adequate affirmative proof to rebut possible prejudice to the appellant or remand the petition to the district court for an evidentiary hearing.

With the foregoing guidelines in mind, we now turn to a review of the various proceedings culminating in the instant appeal.

Appellant alleged in his state and federal habeas corpus petitions that he first met his counsel on the way to the courtroom on the day of the trial.[13] This was not denied by the District Attorney in his answer in the state court. The appointed defense counsel was Vincent A. Tamburo, Esq., of the Allegheny County Legal Aid Society, who was described by the state court as "an attorney of great experience in the trial of criminal cases." [14]

This was not the first time appellant had seen a lawyer, however, as this was a new trial on the same charges,

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F.2d 624 (4th Cir. 1967), and Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967), that once it is demonstrated that counsel had but a brief time to prepare, a prima facie denial of effective assistance has been shown and the burden of proof that counsel's representation was effective then should be placed on the state. We can find no justification, however, for such an allocation of the burden of proof. As with other assertions of a denial of constitutional rights in post-conviction proceedings, the burden remains throughout with the prisoner to demonstrate any constitutional deprivation. (Footnotes omitted.)

For subsequent disposition of a *federal* habeas corpus petition by the same relator [Washington] after *Mathis*, see note 34 *infra*.

The better practice now in this type of case would be to have the "belated appointee" testify at the earliest possible stage of post-conviction proceedings.

[13] Appellant repeated this in the state habeas corpus *hearing*. Hearing Transcript (H.T.) p. 3.

[14] As stated by Justice Roberts in Commonwealth *ex rel.* Washington v. Maroney, note 12, *supra*, 427 Pa. at 612, 235 A.2d at 356, the "issue is not counsel's reputation or his ability, but his stewardship of the challenged trial." Thus a talented defense counsel may be ineffective simply because he has insufficient time for consultation with his client as appellant alleges here. *See also* Goodwin v. Swenson, 287 F. Supp. 166, 183 (W.D. Mo. 1968).

the first one having ended in a mistrial. In the first trial appellant had been represented by another member of the Legal Aid Society staff. Also, in the habeas corpus hearing in the state court, in which appellant appeared,[15] the following colloquy took place:

> "Mr. Abromson [Assistant District Attorney]:
>
> "Q. So you had been in Jail for some five months, is that correct, before your trial?
> "A. Yes.
> "Q. And during that time, did anybody come to see you in your own behalf?
> "A. Which way do you mean? Did an attorney come to see me?
> "Q. Did anyone come to see you in your own behalf?
> "A. Yes." [16]

While it would appear from the foregoing that Mr. Tamburo had access to the Legal Aid Society files in this case, and that an attorney or a representative of Legal Aid may have visited appellant in jail, the plain fact is that appellant did not have the opportunity to consult previously with *the* counsel who came to defend him on the morning of the second trial. We do not know what preparation, if any, counsel was able to accomplish prior to the date of the trial as he did not testify in the state habeas corpus proceeding and there was no evidentiary hearing in the district court. From the lower court opinion, as will appear later, we are led to believe that counsel was not wholly familiar with all aspects of the case before trial.

Appellant asserts as the prejudicial effect of the late appointment the failure to present pre-trial motions to suppress several items of evidence admitted at the trial. The district court concluded from an examination of the transcript of trial that Mr. Tamburo probably had

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[15] Appellant was represented in the state habeas corpus proceeding by another appointed counsel, F. Peter Dixon, Esq. At the beginning of the hearing, counsel indicated to the court that he did not want to take any testimony except for several questions of the appellant. (H.T. p. 2).

[16] H.T. pp. 6-7.

no knowledge of the manner in which some of the evidence was obtained by the police.[17]

Appointed counsel in the state habeas corpus proceeding, Mr. Dixon, did not pursue the belated appointment allegation as an independent ground for issuance of the writ, even though it was stressed in appellant's pro se petition. Mr. Dixon said:

> "I want to make clear to the District Attorney it is not our intention to attack the effectiveness of counsel here. The only reason I brought out this particular circumstance was in relationship, and I will develop it, to the District Attorney's contention that our issue of the suppression of the evidence not being timely, that's the only reason I brought that out.
> "THE COURT: You are not raising—
> "MR. DIXON: I am not raising the issue of the ineffectiveness of counsel.
> "THE COURT: It is in his statement here, his petition, but you are not raising it now?
> "MR. DIXON: No." [18]

Mr. Dixon emphasized that he was referring to the belated appointment only to show why no pre-trial suppression motions had been filed. In his brief (p. 7) the District Attorney construes counsel's statement as indicating "that petitioner was abandoning the contention that his trial counsel was ineffective." In light of our disposition of this appeal we need not decide what effect, if any, the state habeas corpus counsel's statement had on appellant's Sixth Amendment claim which he raised again in the district court.[19]

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[17] 281 F. Supp. at 98. Appellant asserts in his brief before this court that "counsel had no knowledge of the fact [sic] surrounding the arrest or searches."

[18] H.T. p. 7. Appellant remained silent in face of this comment.

[19] In Fay v. Noia, 372 U.S. 391, 439 (1963), it was said that:

> A choice made by counsel not participated in by the petitioner does not automatically bar relief.

[Footnote continued on page 329]

It is fairly clear that Mr. Tamburo's appearance as defense counsel on the morning of the trial constitutes tardy appointment so as to raise the prima facie presumption of ineffective counsel under the *Mathis* standard. With no attempt by the state to rebut this presumption by the production of countervailing evidence, does the record otherwise contain adequate affirmative proof of lack of prejudice? We believe that it does.

Appellant's contention that his arrest without a warrant was invalid is not involved with the question of ineffective counsel. Judge Marsh's opinion below thoroughly recites the information which the police had from eyewitnesses [20] to support the arrest of appellant without a warrant for the commission of a felony: McCray v. Illinois, 386 U. S. 300, 304 (1967).

The evidence as to which appellant contends pre-trial suppression motions should have been but were not filed due to the belated appointment of counsel consisted of (1) revolvers found in a warrantless search of the car in which appellant was a passenger when he was arrested, and (2) revolver shells found in appellant's home pursuant to a search warrant which he claims did not identify the shells. The revolvers were alleged to have been used in the armed robberies and the shells matched the revolvers.

With respect to the revolvers found in the vehicle, the district court held that a warrant was not required because the search was made incident to a lawful arrest. While admittedly the search of the vehicle was not made at the same moment as the arrest, a thorough search was

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[19] [Continued]

On the question of waiver in post-conviction proceedings Smith v. Yeager, 89 S. Ct. 227 (1968), and United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943), suggest a disposition not to find waiver in circumstances such as these. The general problem of waiver is reviewed in Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 Cal. L. Rev. 1262 (1966), and in an informative article by Judge Donald P. Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45, 55 (1968).

[20] 281 F. Supp. at 99-100.

not then possible because of darkness, and the automobile was searched and the revolvers found when the vehicle was taken to a police station a short time later.

As the District Attorney points out in his brief, appellant's reliance on Preston v. United States, 376 U.S. 364 (1964), is misplaced. In *Preston*, an arrest was made for vagrancy and the defendant's car was towed to a garage and some time later searched without a warrant, producing evidence which led to conviction for conspiracy to rob a bank. The search was held invalid both because of the lag of time following the arrest and because there was no direct relationship between the vagrancy charge and the evidence secured.

In upholding the search here, the district court properly relied on United States v. Dento, 382 F.2d 361 (3d Cir.), *cert. denied*, 389 U.S. 944 (1967), in which we distinguished *Preston* in an arrest on a highway where the defendant's vehicle was driven to the State Police barracks some distance away to be searched. For reasons of safety the search was not conducted along the highway where the arrest was made. As in this case, there was a "reasonable nexus" in *Dento*, 382 F.2d at 366, between the offense for which the arrest was made and the search of the vehicle, a nexus absent in *Preston*.[21]

Thus, the failure to file a pre-trial motion to suppress the evidence as to the revolvers was not prejudicial be-

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[21] See, also, United States *ex rel.* Foose v. Rundle, 389 F.2d 54 (3d Cir.), *cert. denied*, 392 U.S. 914 (1968).

The instant case is also to be distinguished from Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216 (1968), in which the Supreme Court held invalid a warrantless search of an automobile where the arrest was made for reckless driving and the rifle found in the search was used to support a conviction for criminal contempt for the violation of an injunction in a labor dispute. After the defendants were arrested in a car on a highway and placed in jail, the police searched their car which had been parked outside the jailhouse by the police. The Court did not reach the question of "remoteness" because of absence of probable cause for the warrantless search as incident to the arrest. Unlike *Dyke*, the search here was directly related to a quest for instrumentalities and fruits of the offense for which appellant was arrested and, as in *Dento*, there was a valid reason for the short delay in making the search of the vehicle after the arrest.

cause, on the merits, it would undoubtedly have been decided against appellant. More importantly, the lower state court and the district court *did* examine this particular issue on the merits and concluded the evidence was admissible.

The matter of the revolver shells found in appellant's home is more difficult. A warrant had been issued to search appellant's home. The warrant was lost and could not be produced at the habeas corpus proceedings in the state and federal courts. Appellant contends that the shells should not have been admitted into evidence because they were not described in the search warrant. The likelihood that the search warrant did not specify the shells is supported by the trial testimony of the police officer making the search.[22]

Complicating the picture was the fact that an objection to the admission of the bullets had been sustained in the first trial which ended in a mistrial. Defense counsel in the *second* trial did object to the admission of the shells on the grounds of irrelevancy and a defective search warrant but his objections were overruled. The district court's opinion indicates that appellant's counsel at the second trial did not know "of any possible impropriety in the manner in which the bullets were seized until the time when they were offered."[23] Even if counsel had known about this earlier, the district court observed, he may still have failed to file a pre-trial suppression motion as he may have been "misled by the exclusion of the bullets at the prior trial into believing that upon objection they likewise would be excluded at the second trial."[24]

Judge Graff, in the state habeas corpus proceeding, rejected the attack on the admission of the shells on the ground that the failure to file a pre-trial suppression motion was prejudicial to the Commonwealth and the

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[22] 281 F. Supp at 98, n.4.

[23] *Id.* at 98.

[24] *Id.*

matter could not be raised at the trial.[25] He also said it "[i]s permissible to seize things other than those described in the search warrant if they have a reasonable relation to the purpose of the search." [26]

The district court held that even if the search warrant is assumed to have been defective, and the revolver shells improperly admitted, this did not entitle appellant to relief because the error was harmless, relying on Chapman v. California, 386 U.S. 18 (1967). The court recognized the *Chapman* test that "before a constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt," and then proceeded to detail the substantial evidence, particularly the testimony of identity witnesses, including the victims of the robberies, supporting the convictions.[27] We agree with the lower court in the application of the harmless error rule in this factual con-

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[25] The state court also believed it was improper to raise the issue of search and seizure on habeas corpus because no direct appeal had been taken. On this point, see Lay, *supra* note 19, at 55.

[26] The court was quoting from Commonwealth *ex rel.* Stoner v. Myers, 199 Pa. Super. 341, 345, 185 A.2d 806, 808 (1962), allocatur denied, which in turn quoted United States v. Joseph, 174 F. Supp. 539, 545 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 504 (3rd Cir.), *cert. denied*, 364 U.S. 823 (1960). See, also, United States *ex rel.* Stoner v. Myers, 329 F.2d 280 (3d Cir. 1964), dealing with the same issues as the Pennsylvania *Stoner* case, *supra*, and United States v. One 1965 Buick, 392 F.2d 672, 679 (6th Cir. 1968).

Recently, we disposed *per curiam* of a similar contention with respect to the validity of a search warrant which did not mention the particular items seized where they were related to the offense charged. United States *ex rel.* Banker v. Maroney, 391 F.2d 926 (3d Cir. 1968). (The facts of the case and the constitutional issues involved are discussed in the opinion of the lower state court in a post-conviction hearing proceeding, *aff'd per curiam*, Commonwealth *ex rel.* Banker v. Maroney, 210 Pa. Super, 702, 231 A.2d 323 (1967), allocatur denied.)

Gurleski v. United States, —— F.2d —— (5th Cir. 1968), holds that under Warden v. Hayden, 387 U.S. 294 (1967), which abolished the "mere evidence" rule, objects seized during a search are admissible, even though not described in the search warrant, if they are reasonably related to the offense committed, whether or not they are in fact fruits or instrumentalities of a crime.

[27] 281 F. Supp. at 98-100.

text.[28] Even apart from the harmless error principle, however, we believe the revolver shells were admissible in accordance with the authorities cited in note 26 in the margin.

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[28] For a good discussion of the application of the harmless error rule in a variety of constitutional issues, see the opinions by Justice Roberts in Commonwealth *ex rel.* Firmstone v. Myers, 431 Pa. 628, 246 A.2d 371 (1968), and Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968).

The harmless error rule has been applied in Fourth Amendment cases: Thompson v. United States, 382 F.2d 390 (9th Cir. 1967); Ethington v. United States, 379 F.2d 965 (6th Cir. 1967); United States v. Ramseur, 378 F.2d 902 (6th Cir. 1967); Young v. Boles, 270 F. Supp. 847 (N.D. W.Va. 1967); Commonwealth v. Pearson, 427 Pa. 45, 233 A.2d 552 (1967).

In *Pearson* it was determined that the error was not harmless; in the other cases it was decided that it was.

In *Ramseur*, a green jacket proved to be the defendant's undoing. A number of witnesses identified him from this distinctive feature so that the admission of the jacket itself, which was the product of an illegal search, was harmless. In the instant case, it was appellant's green sweater that caught the eye of a number of witnesses who identified him. We agree with *Ramseur* that,

> Even if this search was illegal, the case would simply be a classic instance of harmless error. 378 F.2d at 903.

The foregoing line of cases is questioned by Judge Lay in Pope v. Swenson, 395 F.2d 321, 324, n.2 (8th Cir. 1968):

> These courts have so ruled without discussion of the concept that the constitutional rule excluding evidence illegally seized, is not only related to the regulation of a fair trial, but is also meant as a deterrent to illegal law enforcement . . . The Supreme Court has yet to specifically pass on this question. . . . We need not decide this troublesome issue here.

In Bumper v. North Carolina, 391 U.S. 543 (1968), the Supreme Court held the illegal admission of certain evidence not to be harmless error because of its damaging nature; the Court did not discuss the applicability of the *Chapman* rule to Fourth Amendment situations generally.

In a recent decision of this court we declined to decide whether the harmless error rule applies in a *Massiah* (Massiah v. United States, 377 U.S. 201 (1964)) type case where we did find the error to be harmful: United States *ex rel.* O'Connor v. New Jersey, —— F.2d ——, ——, n.22 (3d Cir. 1969).

In Application of Reynolds, 397 F.2d 131, 135 (3d Cir. 1968), we held to be harmless error the rebuttal testimony of a psychiatrist who recounted the version of the crime defendants had related to him without having been warned of their constitutional rights.

From a careful examination of the record and of the opinions of the lower courts which have reviewed this case, we are convinced that there is "adequate affirmative proof" to rebut the prima facie presumption of prejudice from the belated appointment of counsel.[29]

In view of this conclusion, there is no reason to remand the petition for an evidentiary hearing as appellant urges us to do under Townsend v. Sain, 372 U.S. 293 (1963). There are no factual disputes which require resolution by a plenary hearing as in *Townsend*.

The district court had before it the transcript of the state court trial and the transcript of the state habeas corpus proceeding. We have recognized that the appointment of defense counsel here was belated, and we have analyzed the elements of harm asserted by appellant in the admission of the contested evidence. Inadmissibility was claimed on constitutional grounds which have been dealt with on the merits by the district court to our satisfaction. This is not a case where belated appointment of counsel may have resulted in the failure to call witnesses whose availability the defendant did not have a chance to disclose to his counsel or where there was insufficient time to call them,[30] or in the failure to raise defenses of which counsel was unaware or which he was

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[29] Judge Marsh's reliance in the opinion below on his prior decision in United States *ex rel.* Peterson v. Russell, 266 F. Supp. 93 (W.D. Pa. 1967), note 4 *supra*, in which he disposed of a belated appointment claim on review of the entire record in the case, may indicate that the district court in effect used the test we have applied here, even though it did not articulate the subsequent *Mathis* burden of proof rule.

[30] Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967); Townsend v. Bomar, 351 F.2d 499 (6th Cir. 1965); McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); United States *ex rel.* Williams v. Bierley, 291 F. Supp. 912 (E.D. Pa. 1968); Harris v. Peyton, 285 F. Supp. 107 (W.D. Va. 1968).

In Paoni v. United States, 281 Fed. 801 (3d Cir. 1922), this court granted a new trial where due to late mailing of notice of trial retained counsel had insufficient time to secure the attendance of witnesses by subpoena. *Cf.* United States *ex rel.* Spears v. Rundle, note 7 *supra*, where the trial was continued to allow defendant time to secure alleged alibi witnesses.

unprepared to pursue,[31] or in an improvident plea of guilty.[32] At most, counsel failed to file pre-trial suppression motions with respect to certain evidence secured by police searches. Since the district court did not refuse to consider the challenge to the evidence on the merits and dealt with the constitutional infirmities that were raised,[33] the sum and substance of the case is that appellant was not prejudiced by the late appointment of counsel.

We have dwelled at some length on the principal issue in this case because this is one of the first appeals to raise directly the charge of belated appointment of counsel since *Mathis*.[34] The claim of ineffective counsel due

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[31] On failure of counsel to look into, or to have sufficient time to look into, defendant's medical condition for possible defense of insanity, see Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); Hintz v. Beto, 379 F.2d 937 (1967); and Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968). In Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 37 L. W. 3120, the unexplored defense was the want of chastity of the alleged victim of a forcible rape. In Martin v. Virginia, 365 F.2d 549 (4th Cir. 1966), a change of venue may have been indicated if counsel had had time to evaluate the strong community feeling over the case. Shapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947), dealt generally with lack of time to prepare an adequate defense in a military court martial in which the Sixth Amendment was applied.

[32] Calloway v. Powell, 303 F.2d 886 (5th Cir. 1968); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967); United States *ex rel.* Kimbrough v. Rundle, —— F. Supp. —— (E.D. Pa. 1968); Jones v. Peyton, 228 F. Supp. 129 (W.D. Va. 1968); Bentley v. Florida, 285 F. Supp. 494 (S.D. Fla. 1968).

[33] The lower state court had suggested the failure to file pre-trial suppression motions as a possible ground for denial of habeas corpus, but that court also considered the merits of the constitutional challenges.

[34] The *Mathis* rule has been applied in a number of district court cases: United States *ex rel.* Huntt v. Russell, 285 F. Supp. 765 (E.D. Pa. 1968), *appeal pending*; United States *ex rel.* Williams v. Brierley, 291 F. Supp. 912 (E.D. Pa. 1968); United States *ex rel.* Kimbrough v. Rundle, —— F. Supp. —— (E.D. Pa. 1968); United States *ex rel.* Lawson v. Hendrick, —— F. Supp. —— (E.D. Pa. 1968), *appeal pending*; United States *ex rel.* Washington v. Maroney,

to tardy appointment is a serious constitutional challenge which may not be lightly dismissed. We reaffirm the position taken in *Mathis*, and we reiterate the words of Judge Weiner in concluding the opinion:

> The hopeful practical consequence of our rule thus enunciated will be that the states and their judicial systems in the Third Circuit will become more careful in permitting appointed counsel to fulfill in a realistic manner the function which they should have been responsibly assuring all along. 394 F.2d at 753-754.

The denial of the writ of habeas corpus by the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

—— F. Supp. —— (W.D. Pa. 1968), *appeal pending*. *See also* United States *ex rel.* Spears v. Rundle, note 7 *supra*.

In *Williams*, the writ was granted because, *inter alia*, the "short interval between his [counsel's] appointment and the trial made it impossible for him to speak with the defendant's alibi witnesses who were not in court and indeed whom the defendant himself had no opportunity to subpoena for the trial." Also, there were pre-trial suppression motions which might have been helpful to the petitioner. In *Kimbrough*, counsel was appointed on the day of the trial, perhaps even after the trial had commenced, and, evidently on the advice of counsel, petitioner entered a guilty plea. In *Lawson* and in *Washington*, the district court concluded from the evidentiary hearing which it held that the Commonwealth had met the burden of disproving the presumption of prejudice from the claimed belated appointment of counsel.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,219

UNITED STATES OF AMERICA, EX REL,
FRANK CHAMBERS, APPELLANT

vs.

JAMES F. MARONEY, Superintendent,
State Correctional Institution, Pittsburgh, Pennsylvania

(D. C. Civil Action No. 67-1050)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER, FORMAN and STAHL, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed March 6, 1968, be, and the same is hereby affirmed, with costs.

ATTEST:

/s/ Thomas F. Quinn
Clerk

January 22, 1969

SUPREME COURT OF THE UNITED STATES

No. 81 Misc., October Term, 1969

FRANK CHAMBERS, PETITIONER

v.

JAMES F. MARONEY, Superintendent,
State Correctional Institution

On Petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for a writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 830 and placed on the summary calendar.

November 10, 1969

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SUPREME COURT, U.S.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

v.

JAMES F. MARONEY,
SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION
At Pittsburgh, Pennsylvania

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,
Petitioner,

v.

JAMES F. MARONEY,
SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION
At Pittsburgh, Pennsylvania
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the district court (A. 308-315, inclusive) is reported at 281 F. Supp. 96 (W.D. Pa. 1968). The opinion of the court of appeals (A. 320-336, inclusive) is reported at 408 F.2d 1186 (3rd Cir. 1969).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1969 (A. 337). A petition for rehearing was denied on March 17, 1969. The petition, in forma pauperis, for a writ of certiorari was filed in this court on Novem-

ber 10, 1969; the writ was granted on November 10, 1969 (396 U.S. 900). The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether petitioner was deprived of effective assistance of counsel within the meaning of the Sixth and Fourteenth Amendments where he met his appointed counsel for the first time on the way to a courtroom for trial on serious criminal charges?

2. Whether the warrantless search of an automobile was reasonable where the search and seizure of weapons and evidence took place after the occupants were in police custody in the precinct house, the automobile had been removed from the place of arrest to the police station driveway and had already been searched twice, once at the arrest scene and once at the police station?

3. Whether the admission into evidence of dum-dum bullets, wrongfully seized from petitioner's residence, was harmless error where the bullets were matched to those taken from a revolver seized from an automobile in which petitioner was a passenger and a police officer was permitted to testify regarding the damage inflicted by such bullets?

STATEMENT OF THE CASE

During the first week of September 1963, petitioner and three co-defendants, Raymond Lawson, Henry Ramsey and Joseph Jackson, were tried on charges of armed robberies[1] and receiving stolen goods[2] arising out of holdups of two automobile service stations on May 13, 1963[3] and May 20,

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[1]Act of June 24, 1939, P.L. 872 § 705, 18 Purdon's Pa. Stat. Anno. § 4705 (1963), a felony, authorizing maximum penalties of $10,000.00 fine and twenty years imprisonment upon each conviction.

[2]Act of June 24, 1939, P.L. 872 § 817, as amended, 18 Purdon's Pa. Stat. Anno. § 4817 (1963), a felony, authorizing maximum penalties of $1,000.00 fine and five years imprisonment upon each conviction.

[3]Indictments at No. 78 June Sessions, 1963, Court of Oyer and Terminer and General Jail Delivery at Allegheny County, Pennsylvania.

1963,[4] respectively, providing potential total sentences of fifty years imprisonment and thirty thousand dollars ($30,000.00) in fines. Petitioner was represented by an attorney on the staff of the Legal Aid Society of Pittsburgh (A. 35, 266). That trial ended in the withdrawal of a juror and a declaration of a mistrial (A. 266).

On September 27, 1963, the case was called for a second trial before Judge J. Frank Graff and a jury. Judge Graff had not presided over the earlier trial. Enroute to the courtroom that morning, petitioner met Vincent Tamburo, Esq., the attorney who was to represent him at the trial (A. 256). Mr. Tamburo, also a member of the Legal Aid Society of Pittsburgh, was not the attorney who had represented petitioner at the first trial; nor had he previously met with petitioner (A. 255, 256, 266). Mr. Tamburo joined in, but did not argue in support of, a motion to sever the indictments. The trial judge denied this request for separate trials (A. 18, 19).

The trial testimony established that on May 13, 1963 between 2:20 and 2:30 a.m., two negroes walked in the front door of a Boron automobile service station in Turtle Creek Borough, Allegheny County, Pennsylvania, and asked Raymond Havicon, the station manager, for change (A. 20). When Havicon gave the men change, one of them displayed a nickel plated .38 caliber revolver and demanded that Havicon give them everything he had (A. 20, 22). Approximately $66.00 in cash, an automobile driver's license, an automobile owner's card and club cards were taken (A. 21).

Havicon identified a nickel plated .38 caliber revolver found in the vent of Lawson's stationwagon as looking like the gun with which he had been threatened. He also identified as his property, four cards taken with his wallet, also removed from the stationwagon. Havicon made an in-court identification of petitioner as the man who had threatened him with the gun during the robbery (A. 22-24 inclusive).

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[4] Indictments at No. 91 June Sessions, 1963 in the same court.

[continued]

On cross-examination, petitioner's counsel elicited the fact that Havicon had previously identified petitioner at the McKeesport police station about ten or twelve days after the robbery. Petitioner had been shown to Havicon in a four-man "line-up" consisting only of petitioner and the other three defendants (A. 32-34 inclusive, 36, 37, 109, 110). Petitioner's counsel then asked Havicon, "Didn't one of the detectives actually tell you that was the man with the fun?" After Havicon's negative answer, the following colloquy ensued:

> "The Court: I take it you will be able to disprove that, will you?
>
> Mr. Tamburo: What?
>
> The Court: You shouldn't ask that question unless you are prepared to disprove that, contradict him.
>
> Mr. Tamburo: I have the defendant's testimony.
>
> The Court: Disprove it in any way at all.
>
> Mr. Means (prosecutor): I don't understand how the defendant would know what the detectives told him.
>
> The Court: He said he is going to disprove it by the defendant, that's all right, go ahead.
>
> Mr. Tamburo: I am trying to develop a line of questioning on cross examination to discredit some of his identification.
>
> The Court: I understand what you are doing, I am only making a statement that you shouldn't ask questions which, if he denies, you are not prepared to disprove.
>
> Mr. Tamburo: I see." (A. 34)

Immediately thereafter, the prosecution had Officer Reddington, who was present at the stationhouse identification, testify that he did not tell Havicon whom to select from the "line-up." Mr. Tamburo did not cross-examine (A. 37).

It was further established that on May 20, 1963, at approximately 11:25 or 11:30 o'clock p.m., fourteen year old Linda Oschinick and her seventeen year old boyfriend, Jerry Klaus, observed a light blue stationwagon, occupied by four negro men, in a parking lot approximately one block from the Oschinick home in North Braddock Borough, Allegheny County (A. 39-43, inclusive, 49-52, inclusive). Thereafter, they observed the blue stationwagon circling the block encompassing the Oschinick home, the parking lot and a Gulf automobile service station. The service station could not be seen from the parking lot (A. 103).

At 11:45 o'clock p.m. on May 20, 1963, two men approached Steven Kovacich, the attendant at the Gulf service station in North Braddock and displayed two pistols (A. 53, 54). At their direction, Kovacich delivered to them the money in his cash register and put the coins into his right hand glove (A. 54-55). The shorter of the two men was wearing a green sweater, khaki trousers and hat and held a chrome revolver. He had a mustache (A. 57). The taller man was wearing a cap and trench coat and also had a mustache (A. 57, 58). After the two men left, Kovacich telephoned the police (A. 59, 60).

At trial, Kovacich could not identify any of the four defendants but testified that he identified petitioner in a four man "line-up" at the police station the day after the robbery (A. 59). Kovacich stated that $85.00 had been taken from him. Lawson's attorney, referring to Kovacich's testimony at the first trial, questioned him about his prior testimony that $211.00 had been taken (A. 64, 65).

At approximately 11:50 o'clock p.m. on May 20, 1963, Oschinick and Klaus observed a man running from the Gulf service station yelling that there had been a robbery (A. 41, 52). They also saw the same blue stationwagon leaving the parking lot across the street from the service station at a speed of 45 to 50 miles per hour, heading towards Braddock Borough (A. 41, 52). They then walked to the service station and told the police that they had seen the blue

stationwagon (A. 49). They never saw anyone get out of the vehicle and did not identify any of its occupants (A. 50).

At 11:52 o'clock p.m. on May 20, 1963, Lieutenant Wagner of the North Braddock Borough Police received a radio call to proceed to the Gulf service station. He arrived there a few minutes later and talked with Kovacich who described the two men involved in the robbery (A. 84). Wagner also talked with Klaus and Oschinick who gave him a description of the car which was then broadcast on the police radio (A. 85).

Between 12:30 and 12:45 o'clock a.m. on May 21, 1963, Officer Herman of the neighboring Swissvale Borough Police Department received a message on his car radio informing him of a robbery in North Braddock and alerting him to watch for a light blue compact stationwagon occupied by four colored men (A. 70-72, inclusive). He observed a car fitting the description proceeding in the opposite direction and pulled his car into a parking lot to reverse his direction (A. 71). In the parking lot, Herman met his brother officer, Hagan, who called his desk sergeant to verify the description of the vehicle. Herman and Hagan then followed the stationwagon into Rankin Borough where they stopped it in a parking lot on a side street, because of the traffic (A. 71, 72, 77, 78). The stationwagon had been travelling towards the scene of the robbery (A. 75).

Officers Herman and Hagan ordered petitioner, Lawson, Jackson and Ramsey out of the car and conducted a search of their persons. No weapons were found (A. 72, 74). Lieutenant Wagner, who had been informed of the arrest, drove to the scene. Together with Lieutenant Payne of the neighboring Rankin Borough Police, he searched the stationwagon by searchlight (A. 79, 86, 173). A trench coat was found on the seat of the car, and he observed that petitioner was wearing a green sweater (A. 85).

The four defendants were taken to various police stations by the arresting officers. Lawson, the owner of the stationwagon, drove it to the North Braddock police station and

parked it in the station driveway (A. 87, 89, 175). Lawson and petitioner were taken into the police station where they were again searched and money taken from their persons (A. 87, 88). Lieutenant Wagner and Officer Cassidy again searched the stationwagon, "went through everything, but did not find anything" (A. 89, 107, 108.) They returned to the police station and talked with petitioner and Lawson who did not give them any additional information (A. 89, 107). They then proceeded to again search the stationwagon (A. 89, 90, 107, 108). During the course of this search, Officer Cassidy opened a vent under the dashboard and found two .38 caliber revolvers, one of which was loaded with four dum-dum bullets (A. 132, 133), a glove full of coins, three automobile operator's permits and a club membership card (A. 90, 91, 96, 97, 107, 108).

On May 21, 1963, James Haverly, Assistant Chief of the North Braddock Police Department, obtained a search warrant to search the homes of the four defendants (A. 126). A search of the homes of Lawson, Jackson and Ramsey produced nothing (A. 126, 127). A search of petitioner's home, approximately eight hours after the robbery, resulted in the discovery of a brown leather holster, one box of thirty-three .38 caliber Smith & Wesson cartridges and a number of loose .38 caliber cartridges, 42 of which were loaded with dum-dum bullets (A. 127, 128, 131).

Petitioner's counsel objected to the admission of the bullets, pointing out that at the first trial:

> ". . . it was objected to and the objection was sustained, and I would also like to object to it now, I don't think it is good for the jury to hear it. I don't feel there is any relevancy or connection between the fact there were .38 caliber bullets at his home and the fact that a .38 caliber gun was found, not on the person of Chambers, but in the group." (A. 82).

After reserving decision, the court overruled the objection (A. 128, 129). The bullets not only were admitted but

Officer Haverly testified to the peculiar nature of dum-dum bullets, which, unlike ordinary bullets, tear a larger hole in the body while exiting from it (A. 128).

Petitioner's counsel renewed his objection to the admission of the bullets on the grounds that the search warrant did not "indicate any reasonable ground for the officers to come into Chambers' house," and did not "set forth specifically what they are looking for." (A. 130). The following colloquy took place:

> "The Court: Well, of course, you have known about this from the other trial three weeks ago.
>
> Mr. Tamburo: I wasn't the attorney at the other trial.
>
> The Court: But, you knew about it?
>
> Mr. Tamburo: I didn't know a thing about the search warrant until this morning.
>
> The Court: You knew about the evidence about to be introduced, you told me about it.
>
> Mr. Tamburo: It wasn't admitted.
>
> The Court: That doesn't mean I have to exclude it now.
>
> You have not conformed to the rules of the Superior Court with the suppression of evidence. There are recent rulings by the Superior Court which says what you have got to do, you haven't done it. I think there is reasonable ground for making a search here, even without a Warrant, and that's also a preliminary matter. We overrule the objection and allow an exception." (A. 130, 131)

Only Lawson testified in his own defense. He described how Kovacich had identified petitioner at the station house but had been unable to identify anyone else. He admitted being in the car on May 20 and 21 but claimed that if anything had happened with respect to robbery, he was unaware of it because he had been asleep in the back of the

car. He admitted to a prior conviction for murder in the second degree and to having pleaded guilty to charges of attempt with intent to kill, assault with intent to maim, pointing deadly weapons and carrying firearms without a license (A. 181, 182).

The jury returned verdicts convicting petitioner and Lawson of both counts at No. 78 June Sessions, 1963 and convicting the four defendants at No. 91 June Sessions, 1963 (A. 236). On January 24, 1964, Chambers was sentenced to a term of four to eight years on the charges at No. 78 and a term of two to seven years on the charges at No. 91. No post trial motions were filed by or on behalf of petitioner (A. 265, 266).

A little more than two years after his conviction, petitioner filed a pro se petition for a writ of habeas corpus in the Court of Common Pleas of Allegheny county[5] alleging in addition to three claims of unconstitutional search and seizure, a claim that the late appointment of trial counsel deprived him of the effective assistance of counsel (A. 237, 241-245, inclusive). At the hearing on this petition, trial judge Graff presided and petitioner was again represented by an attorney on the staff of the Legal Aid Society of Pittsburgh (A. 239, 327, n. 15). Petitioner testified that he had met his trial counsel on the way to the courtroom on the morning of the trial. The petition was denied.[6]

After exhausting his state appellate remedies, petitioner filed a pro se petition for writ of habeas corpus in federal court containing allegations similar to those presented in state court.[7] The district court did not assign counsel and

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[5]No. 1988 January Term, 1966.

[6]Affirmed, *Commonwealth v. Chambers,* 209 Pa. Super. 709, 224 A.2d 371 (1966), Hoffman, J., dissenting, would remand for a hearing on the constitutional question, allocatur denied by the Pennsylvania Supreme Court.

[7]*United States ex rel. Chambers v. Maroney,* No. 67-1050, in the United States District Court for the Western District of Pennsylvania.

no evidentiary hearing was held. After hearing oral argument by the state, the court denied the petition, devoting one paragraph to petitioner's claim of ineffective representation. The court found, however, that there was evidence:

> ". . . tending to show that relator's counsel had no knowledge of any possible impropriety in the manner in which the bullets were seized until the time when they were offered," and that
>
> ". . . he was misled by the exclusion of the bullets at the prior trial into believing that upon objection they likewise would be excluded at the second trial."[8]

On appeal, the court of appeals affirmed,[9] holding for the first time, that the presumption of ineffective representation as a result of belated appointment of counsel could be rebutted not only by evidence produced by the state in an evidentiary hearing but also by *adequate* affirmative proof *otherwise* appearing in the record demonstrating that the appellant was not prejudiced. Assuming that petitioner's claim of ineffective representation related only to the search and seizure claims,[10] the court decided those claims adversely to petitioner, stating that:

> "This is not a case where belated appointment of counsel may have resulted in the failure to call witnesses whose availability the defendant did not have a chance to disclose to his counsel or where there was insufficient time to call them, or in the

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[8] 281 F.Supp. 96, 98 (W.D. Pa. 1968). In his petition to the district court, however, petitioner states that he was without counsel prior to trial. Counsel was designated to represent petitioner enroute to the courtroom on the day of the trial. This belated appointment rendered counsel's services ineffective, opportunities of pre-trial motions or hearings and discovery opportunities, which in itself is a denial of equal protection and due process of law. (A. 278-287, inclusive).

[9] 408 F.2d 1186 (3rd Cir. 1969).

[10] *Id.* at 1191.

> failure to raise defenses to which counsel was unaware or which he was unprepared to pursue, or in an improvident plea of guilty. At most counsel failed to file pre-trial suppression motions with respect to certain evidence secured by police searches.[11]

Thereafter, petitioner personally filed his petition for writ of certiorari in this court, and the writ was granted November 10, 1969.

SUMMARY OF ARGUMENT

I

Petitioner's right to effective assistance of counsel was denied where he first met his appointed lawyer on the way to the courtroom for trial on felony charges.

A. The court of appeals erred in determining that petitioner would have been deprived of effective assistance of counsel only if the court found actual prejudice from the late appointment. This Court, on prior occasions, has foreclosed inquiry into the possibility of prejudice when discussing alleged violations of the accused's right to effective assistance of counsel. *Powell v. Alabama,* 287 U.S. 45 (1932). To make effective the right to counsel guaranteed by *Gideon v. Wainwright,* 372 U.S. 335 (1963), this Court should hold that late appointment, in the circumstances of this case, was no appointment.

B. The court of appeals erred in failing to find that petitioner had suffered actual prejudice by the late appointment of counsel. The court below adopted a rule, first promulgated in the fourth circuit, that where there has been late appointment of counsel the burden of proving that the habeas corpus applicant was not prejudiced thereby shifts to the state, which may satisfy this burden by *adequate* affirmative evidence of lack of prejudice from the record.

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[11] *Id.* at 1195, 1196.

That burden is too light. We submit that adequate affirmative evidence is insufficient to show that a fundamental constitutional right has not been violated. In any event, however, the record establishes actual prejudice to petitioner.

II

The seizure of items from an automobile in which petitioner had been a passenger was unreasonable because the arresting police officers did not have probable cause to arrest and the search conducted without warrant was not incident to the arrest.

A. The police officers lacked probable cause for the arrest. The arresting police officers had been advised of a robbery committed by two men in a neighboring community forty-five minutes to one hour before they stopped the automobile in which petitioner was a passenger and made the arrest. The only information the officers possessed was supplied by informants of unknown reliability. These informants had seen a light blue stationwagon with four negro occupants parked across the street from the scene of the robbery and had witnessed it being operated from that place at about the time of the offense. At the time of arrest petitioner was one of four male negro occupants of a light blue stationwagon. This is not sufficient to establish probable cause.

B. The search and seizure from the automobile was not incident to the arrest. After the automobile had been stopped, petitioner and the other three occupants and the automobile were searched. Petitioner and the owner of the vehicle were taken to a neighboring police station. After questioning these men, and while they were in custody inside the stationhouse, the automobile was thoroughly searched. After further questioning a third search of the automobile was made and items seized. The admission of these items into evidence was a violation of petitioner's fourth and fourteenth amendment rights. The lower court

improperly distinguished *Preston v. United States*, 376 U.S. 364 (1964) which held unreasonable searches and seizures made where the suspect was in custody and there was no danger that any of the men arrested could have used any weapons in the car to assault an officer or escape or could have destroyed evidence.

III

Admission into evidence of dum-dum bullets taken in an unreasonable search and seizure from petitioner's home was harmful error. The lower courts assumed that the dum-dum bullets were taken pursuant to an invalid warrant, but they concluded the constitutional error was harmless beyond a reasonable doubt. The courts mistakenly concluded that the evidence were merely cumulative and that there was other sufficient evidence to convict. These conslusions are not supported by the record, which demonstrates that the bullets were a necessary link in the conviction and formed the basis for prejudicial and inflamatory remarks by a police officer.

ARGUMENT

1

PETITIONER'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHERE PETITIONER, AN INDIGENT, MET HIS APPOINTED COUNSEL ON THE WAY TO THE COURTROOM IMMEDIATELY PRIOR TO TRIAL.

A. Late appointment of counsel in the circumstances of this case did not provide petitioner with effective assistance of counsel.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963) the right to counsel of one charged with a serious crime was held to be fundamental right, essential to a fair trial.[12] In so holding, the Court re-affirmed principles first expressed in *Powell v. Alabama*, 287 U.S. 45 (1932).[13] *Powell*, however, established that the right to counsel was not a hollow one but one which meant the assistance of counsel who was not appointed "at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case:"[14]

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[12]The *Gideon* Court declared: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him". 372 U.S. at 344.

[13]"[The defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. at 68-69.

[14]287 U.S. at 71; see also *Reece v. Georgia*, 350 U.S. 85, 89, 90 (1955); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The components of the right to *effective* counsel are found in the decisions of this and other courts. The most basic ingredient is time. *Hawk v. Olson,* 326 U.S. 271, 278 (1945). Time means adequate opportunity to prepare for trial. *White v. Ragen,* 324 U.S. 760, 763, 764 (1945). Preparation for trial assumes adequate consultation with the defendant. *House v. Mayo,* 324 U.S. 42, 45, 46 (1945), and contemplates adequate investigation into the facts of the case. *Powell v. Alabama, supra,* 287 U.S. at 58. Counsel must consider the existence of various possible defenses. *Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir. 1968).[15] He must ponder whether constitutional issues exist and the necessity for legal research. *Roberts v. Dutton,* 368 F.2d 465 (5th Cir. 1966).[16]

The vast panoply of pre-trial motions available in a modern day criminal proceeding and which may affect the most critical phases of the case must be weighed and, where appropriate, pursued. Counsel must consider the numerous options available to the defendant and must consult with him concerning them. *Calloway v. Powell,* 393 F.2d 886, 888 (5th Cir. 1968).

Without counsel at pre-trial stages of the action against him, an accused is unable to determine if his arrest was lawful; the propriety of identification procedures; the validity of complaint and indictment procedures; the existence of

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[15] "Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigation, both factual and legal, to determine if matters of defense can be developed, and to allow him enough time for reflection and preparation for trial."

[16] Report on Criminal Justice Act, 36 F.R.D. 277, 338-341, inclusive (1965) contains a checklist of preparatory steps to be performed by counsel under the Act and suggests many of the matters counsel should consider.

reasonable cause for searches and seizures; and whether any of those procedures should or must, under pain of waiver, be tested by preliminary motion.

An accused cannot analyze the law applicable to charges against him; nor can he weigh the legal implications of a conviction. He is unable to consider effectively a plea of guilty and any possible bargaining in connection therewith. If petitioner does not have the assistance of counsel at any of these critical times, he has not had effective assistance of counsel.

The decision of the court of appeals in this case followed its decision in the *United States ex rel. Mathis v. Rundle*, 394 F.2d 748 (3rd Cir. 1968), holding that the district court properly dismissed petitioner's application for writ of habeas corpus after determining that petitioner had not been *actually* prejudiced by the late appointment of counsel. This holding is inconsistent with a long line of decisions of this Court and other federal courts which hold that the mere danger of prejudice from an infringed right to counsel is the appropriate determination for protecting a defendant's right to counsel.

Petitioner met his appointed lawyer for the first time enroute to the courtroom for trial on criminal charges which could have resulted in fifty years imprisonment and total fines of thirty thousand dollars. We are unable to determine from the record, what, if any, preparations counsel made prior to trial. We do know, however, that his failure to file pre-trial motions to suppress[17] resulted in the introduction of evidence which, as hereinafter indicated, should have been excluded.

We may infer from the record that counsel had insufficient time to confer with his colleagues and with petitioner. Had counsel talked with the lawyers for the other defend-

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[17]The trial judge overruled the objection to the evidence on the procedural grounds that it was not made timely (A. 130, 131).

ants he would have learned that one of them, counsel for Lawson, had available the notes from the previous mistrial. From those notes petitioner's counsel could have learned the bases for the exclusion of evidence seized in a search of petitioner's home. From this same counselor, he would have learned that Lawson would take the witness stand in his own defense and admit to a conviction for second degree murder (A. 182) and having pleaded guilty to charges of attempt with intent to kill, assault with intent to maim, pointing deadly weapons and carrying firearms without a license (A. 182, 183). With this information at his disposal, petitioner's counsel could have cogently argued the motion for a separate trial of the charges against petitioner. Instead, he merely joined in the motion, without comment (A. 18). How could counsel have adequately discussed the alternatives of jury trial versus non-jury trial on the way to the courtroom; or other alternatives—whether petitioner should testify, testimony of possible witnesses or plea bargaining in the circumstances?

Adequate time to prepare would have enabled counsel to assert timely and valid objections to introduction of the revolvers and cards into evidence, which he was unable to do at trial. That petitioner was exposed to more than the mere danger of prejudice is self evident. The indigent's right to the assistance of counsel, guaranteed by *Gideon, supra.* can only be meaningful if counsel has sufficient time to inform himself of his client's case to which he has been assigned to reflect upon it and to prepare for trial. Appointment of counsel in this case on the way to the courtroom foreclosed inquiry and reflection and highlights the premise that *late appointment is no appointment.*

In other cases, involving the right to a fair trial, this Court has refused to consider whether in a particular case the defendant has been *actually* prejudiced by a challenged practice. These cases are apposite to situations where there has been late appointment of counsel. *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965);

Rideau v. Louisiana, 373 U.S. 723, 727 (1963). This, because

> ". . .our system of law has always endeavored to prevent even the probability of unfairness. '. . . to perform its high function in the best way 'justice' must satisfy the appearance of justice." *In Re Murchison,* 349 U.S. 133, 136 (1955).

This judicial insistence on preventing the existence and appearance of unfairness has been specially strict where the right to counsel has been involved. No component of the concept "effective assistant of counsel" is more obviously absent; none detracts more from the appearance of justice than a lawyer who commences a trial moments after his designation as counsel.

Once the court determined in *Powell v. Alabama, supra,* that appointed counsel proceeded to trial without conducting a thorough investigation of the facts in the case, the deprivation of defendants' right to the effective assistance of counsel. It was as if, in fact, no counsel had been appointed. That no prejudice could be proved had resulted from lack of preparation was deemed irrelevant. 287 U.S. 73-77.

In *Glasser v. United States,* 315 U.S. 60 (1942), this Court considered the matter of prejudice in connection with the Sixth amendment right to counsel where Glasser's attorney was ordered to also defend one of Glasser's co-defendants. In holding that assistance of counsel contemplates unimpaired assistance, free from conflict, this Court stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at one difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amounts of prejudice arising from its denial.*" 315 U.S. at 75, 76 (Emphasis added.)

In a series of cases dealing with the denial of counsel in recidivist proceedings, the Court again foreclosed any at-

tempt to demonstrate that the defendant had not suffered prejudice by virtue of the denial of his right to counsel. *Chewning v. Cunningham,* 368 U.S. 443 (1962); *Reynolds v. Cochran,* 365 U.S. 525 (1961); *Chandler v. Fretag,* 348 U.S. 3 (1954).

> "It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel." 365 U.S. at 531, n. 12.

Where the accused was without counsel at a critical pretrial stage of the proceedings, the Court again disclaimed any interest in a quest for prejudice:

> "We repeat what we said in *Hamilton v. Alabama, supra,* (368 U.S. at 55), that we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.'" *White v. Maryland,* 373 U.S. 59, 60 (1963).

In *United States v. Wade,* 388 U.S. 219 (1966), the judicial recognition of the critical character of the period of time from arraignment to trial, first expressed in *Powell,* reached its zenith. *Wade* established the right to counsel at a police "line-up", confirming the right solely because of the "potential substantial prejudice" inherent in such a confrontation. 388 U.S. at 227.

Finally, in *Chapman v. California,* 386 U.S. 18 (1967), this Court adopted a federal harmless error rule and observed:

> ". . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ." 386 U.S. at 23, citing in footnote 8, *Gideon v. Wainwright, supra.*

The court of appeals in petitioner's case held that the late appointment of counsel made out a prima facie case of denial of effective counsel, but the denial was rebutted by *adequate* affirmative evidence to rebut the presumption. This was nothing more than a harmless error rule, requiring

only *adequate* proof to show harmlessness. The circuit court *ipse dixit* directly contradicts this Court's command that there be no inquiry into degrees of prejudice from ineffectiveness of counsel. It would dilute *Chapman,* which held that constitutional error can be held harmless only where it is found harmless *beyond a reasonable doubt.*

The possibility of prejudice is so evident in this case that this Court should declare that petitioner was denied the effective assistance of counsel and reverse the denial of the writ of habeas corpus.

B. The court of appeals erred in finding that petitioner was not prejudiced by the late appointment of counsel.

We have asserted that the late appointment of counsel in this case was so inherently prejudicial that specific proof of prejudice is not necessary for reversal. This premise is founded in the many decisions of this Court holding that the Sixth amendment right to "assistance of counsel" is so fundamental that it will not admit of speculation as to possible impairment or lack of effectiveness.

If this Court does not yield to the persuasiveness of this contention, then we submit that the Court will find in this case that (1) petitioner did indeed suffer prejudice because of the late appointment of his counsel; prejudice which, contrary to the findings of the district and circuit courts, exists in the record or (2) the record is, at the least, undeterminative on the issue of prejudice and the court of appeals should not have attempted to determine from the record the manner in which prejudice could not exist.

In *United States ex rel. Mathis v. Rundle,* 394 F.2d 748, 753, 754 (3rd Cir. 1968) the court of appeals fashioned a procedural rule that late appointment of counsel constitutes a prima facie case of ineffective representation, subject to rebuttal by the prosecution through an evidentiary showing

by strong affirmative proof that the late appointment was not inherently prejudicial to defendant.[18]

Mathis can only be accepted if by inherent prejudice the court means that in the short period of time between assignment of counsel and trial, defense counsel pursued all necessary steps in the circumstances of the particular case and that no *possibility* of prejudice existed at any stage of the proceedings.[19]

Moreover, the court of appeals in the instant case has modified *Mathis* to allow rebuttal from the face of the trial record alone[20] by *adequate* affirmative evidence.[21] The trial record, standing alone, will establish only those things recorded during *trial.* It cannot establish what counsel was required to do, and did not do or could not have done in the circumstances of the case; nor what could have been done and was not done prior to trial.

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[18]Following decisions of the court of appeals for the fourth circuit in *Fields v. Peyton,* 375 F.2d 624 (4th Cir. 1967); *Twiford v. Peyton,* 372 F.2d 670 (4th Cir. 1967); *Martin v. Virginia,* 365 F.2d 549 (4th Cir. 1966).

The *Mathis* court obviously understood the problem:

> "Mere appointment before trial of counsel to represent an indigent criminal defendant is not enough. Legal aid must be administered by trial courts for indigents under such conditions that their representation approximates in its vigor, zeal, and thoroughness that of counsel retained and paid by those other defendants who can afford to do so. The need for careful scrutiny in the matter of adequate opportunity for preparation by appointed defenders is certainly as important as any desire to dispose of clogged dockets." 394 F.2d at 753

[19]But the *Mathis* rule does not require inquiry into the possibility of prejudice. Rather it permits the state to rebut the presumption by showing that there was no actual prejudice to defendant.

[20]408 F.2d at 1195.

[21]*Id.* at 1190.

[continued]

To use the cold record alone and decide—not that there was no danger of prejudice from belated assignment—but only that on the claims presented in the record, petitioner was not prejudiced, ignores the obvious fact that the trial record was inadequately protected and wholly silent on the effectiveness of pre-trial preparation. To find that no harm resulted from late appointment is to overlook the unexpressed damage; the possibility of harm, and to return to a purely functional approach, thought to be in repose since the demise of *Betts v. Brady*, 316 U.S. 455 (1942). This holding also violates the spirit of *Chapman v. California, supra*, as it substitutes for the *Chapman* rule for determining harmless error a test requiring only *adequate* proof[22] of no actual prejudice.

Prior to the rules in the instant case, lower federal courts, consistent with the language of *Powell* and its progeny, refrained from considering the probable result of a late appointment of counsel. By considering the probable result in this case, the court of appeals has departed from the very rule which it set out to follow as developed by the fourth circuit and so well expressed by that court in *Martin v. Virgina:*

> "Whether any attorney would actually have advised petitioner differently because of these factors, or others not disclosed in the record, is not the question. The question is not one that can now be answered with any degree of certainty, nor need it be answered. The point is that because of the haste that marked the entire process, this lawyer was in simply no position to evaluate his case and make considered judgments on the matters." 365 F.2d at 553, 554.

If *Martin* is applied to this case, the decision below cannot stand. The court of appeals, relying upon dicta in *Fields v. Peyton, supra*, determined that an evidentiary hearing was not necessary and that the record contained adequate affirmative proof that petitioner had not been

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[22] 408 F.2d at 1190.

prejudiced.[23] The court's findings do not support its conclusion; rather they suggest matters showing identifiable prejudice to petitioner.[24] Accenting the circuit court's technique, additional prejudicial matters are evident in the record.[25]

Had the court of appeals correctly applied *Mathis* it would have found evidence of prejudice to petitioner. The record does not contain "adequate affirmative evidence to

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[23]The court reviewed the record and found: at his first trial petitioner was represented by another member of the Legal Aid Society; an attorney or representative of the Legal Aid may have visited petitioner in jail; petitioner did not have the opportunity to consult previously with *the* counsel who defended him at trial; there was no evidence of what preparation, if any, the attorney made; "counsel was not wholly familiar with all aspects of the case"; counsel was not able to timely file motions to objectionable evidence seized pursuant to an invalid search warrant (disposed of as harmless error); other evidence was seized incident to a lawful arrest.

[24]No opportunity to consult with attorney before trial; no evidence of preparation by attorney; counsel not familiar with all aspects of case (the district court opinion says: "Further, there is evidence tending to show that relator's counsel had no knowledge of any possible impropriety in the manner in which the bullets were seized until the time they were offered." 281 F.Supp. at 98; insufficient time to file pre-trial motions.

[25]Petitioner's counsel joined in a motion to sever the indictments for trial without stating reasons. If he had conferred with his colleagues, he would have known that Lawson was going to take the stand and admit to a conviction of murder in the second degree. Opportunity to prepare motions to suppress would have enabled him to test probable cause for arrest, validity of warrantless search and seizure from car and of specificity of warrant employed to seize evidence from petitioner's home. Counsel was in obvious difficulty when during his cross examination of witness, Havicon, he stated (A. 34) that he would disprove the witness's statements by the petitioner's testimony. Again, with time to prepare he could have obtained the notes of the previous trial to impeach witness Kovacich, as Lawson's counsel was able to do (A. 65-67 inclusive, 204-207, inclusive).

overcome the presumption of harm", it contains abundant evidence of prejudice to petitioner.

If the court could not perceive the affirmative evidence of ineffectiveness of counsel in the record, it should have remanded for evidentiary hearing under the doctrine of *Townsend v. Sain*, 372 U.S. 293 (1963), where this Court stated circumstances under which a district court must hold an evidentiary hearing in federal habeas corpus proceedings:

> "If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fully supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a fair and full hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts are not adequately to developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313.

Was the state fact-finding procedure adequate and were the material facts adequately developed if: petitioner's trial counsel did not testify as a witness; the records of the Legal Aid Society were not introduced in the state hearing; the petitioner was not thoroughly examined regarding his discussion, if any, with his attorney and what possible defenses were available to him? There is no explanation of why the other defendants filed post trial motions and the petitioner did not. Indeed there is no showing that the attorney discussed such motions and appeals with petitioner. Omissions in the trial record should have been rectified by facts developed at a hearing—not by presumptions.

Townsend teaches that the district judge may rely upon relevant facts found by a state court judge in habeas corpus hearing but cannot defer to state court conclusions of law. The state court erred in concluding that petitioner had no standing to raise an objection at trial to the search and seizure of items from the stationwagon since the proper procedure was pre-trial motion to suppress and its timely

filing could not be waived, citing Federal Rule of Criminal Procedure 41(e).[26]

The court of appeals, therefore, erred in not reversing the denial of the writ of habeas corpus, or minimally, in failing to remand the case to the district court to hold a full evidentiary hearing to determine the facts in connection with petitioner's habeas corpus petition.

II.

THE SEIZURE OF ITEMS FROM THE AUTOMOBILE IN WHICH PETITIONER WAS A PASSENGER WAS UNREASONABLE BECAUSE THE POLICE OFFICERS DID NOT HAVE PROBABLE CAUSE TO ARREST WHERE THE ONLY INFORMATION THEY HAD WAS A GENERAL NIGHTTIME DESCRIPTION OF AN AUTOMOBILE AND THE NUMBER AND RACE OF ITS OCCUPANTS, AND BECAUSE THE WARRANTLESS SEARCH TOOK PLACE AFTER THE OCCUPANTS OF THE AUTOMOBILE AND THE AUTOMOBILE WERE IN POLICE CUSTODY.

A. The police lacked probable cause to arrest petitioner.

In the state and federal habeas corpus proceedings petitioner has asserted the lack of probable cause for his arrest.[27] Approximately forty-five minutes to one hour

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[26] However, Rule 41(e) specifically provides: "The motion shall be made before trial or hearing *unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion,* but the Court in its discretion may entertain the motion at the trial or hearing. (Emphasis added.) See Pennsylvania Rule of Criminal Procedure 2001(b), effective October 1, 1963.

[27] For purposes of this brief, the issue of probable cause for petitioner's arrest will be discussed in connection with the admissability of evidence seized in connection with the arrest. Although not raised as a separate matter for argument in this brief, if the Court finds lack of probable cause for arrest, then petitioner's conviction must be reversed. *Beck v. Ohio,* 379 U.S. 99 (1964).

after the occurrence of a robbery in another municipality, two police officers received a police car radio report to look for a light blue stationwagon occupied by four colored men (A. 70, 71). The officers observed a car so described travelling toward the scene of the robbery (A. 75). They followed it and, because of traffic conditions, forced it onto a parking lot on a side street (A. 71, 72, 77, 78).

After stopping the vehicle the police officers ordered the four occupants, including petitioner, out of the car and searched their persons. Nothing was found in this search. Thereafter, other police officers arrived at the scene of the arrest[28] and searched the stationwagon (A. 79, 86, 173). Again nothing was found (A. 72, 74). Following the search of the automobile at the arrest scene, petitioner and Lawson, the owner of the car, were taken to the police station in the municipality where the robbery occurred and were questioned. Subsequently, two police officers "went through everything" in the vehicle, which was then parked in the driveway to the police station, but found nothing (A. 89, 107, 108).

The searching officers returned to the police station and again questioned petitioner and Lawson, but neither disclosed any additional information. Thereafter, the officers searched (the third time) the stationwagon, and after an unindicated period of time opened a vent in the heater under the dashboard, and found two .38 caliber revolvers (one loaded with dum-dum ammunition), coins and a glove subsequently identified as having been taken in the robbery of the previous evening, and the cards taken in a robbery committed a week before the arrest (A. 90, 91, 96, 97, 107, 108). Petitioner and the vehicle owner were in custody inside the police station at the time the latter two searches of the vehicle were conducted (A. 97).

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[28]These officers had talked with the teenage informants who had related their observation of the light blue stationwagon circling the service station and parked across the street from the station. They had also talked with the station attendant who said that one of the robbers wore a green sweater and the other a tan trench coat.

[continued]

The constitutional validity of a search without a warrant depends, in the first instance, upon the constitutional validity of the arrest.[29] In *Beck v. Ohio, supra,* this Court announced the test for determining validity of arrest:

> "Whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made,* the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge which they had reasonably trustworthy information were sufficient to warrant a proof prudent man in believing that the Petitioner had committed or was committing an offense." 379 U.S. at 91. (Emphasis added.)

The Court observed:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hind-sight judgment."
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> * * *
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> "When the constitutional validity of an arrest is challenged, it is the function of the Court to determine whether the facts available to the officers at the moment of arrest would 'warrant a man a reasonable caution in the belief that an offense had been committed'. *Carroll v. United States,* 267 U.S. 132, 162. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function." 379 U.S. at 96.[30]

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[29]Further inquiry into the scope of the search, hereinafter discussed, is necessary where the arrest is found to be lawful.

[30]In *Beck,* the Court had the benefit of testimony from the police officers at a pre-trial hearing on a motion to suppress this evidence. The Court noted that the record of the testimony was at best "meager". In the instant matter the late appointment of counsel prevented such a motion to be filed. We must thus look solely to the record of the testimony of the arresting police officers at trial. This record fails to disclose when petitioner was arrested.

Construing the evidence most favorably to the Commonwealth, we find that, at the moment they stopped the stationwagon, the first two police officers had knowledge that a robbery had occurred forty-five minutes to one hour previously in a neighboring municipality and that they had been asked to look for a light blue stationwagon occupied by four colored men, information supplied by two teenagers of unknown reliability and opportunity to observe. If we assume further, that the arrest was made after other officers arrived on the scene supplied with additional information that one of the robbers wore a green sweater and the other a tan trench coat, there was not probable cause for arrest.

There was no information connecting the automobile to the robbery, *viz:* no one saw either of the robbers enter the stationwagon, heard a door slam, a motor start or footsteps. In fact, the attendant did not know how the robbers left the scene.

When this information is evaluated, we submit that it falls far short of standards for probable cause since there was no connection between the stationwagon and the robbery, no physical descriptions of height, weight, markings or other characteristics except skin color. The police had no reason to infer reliability of the informatns, *viz:* they did not know anything of the teenagers' opportunity to observe or the reliability of them or the attendant.

When this information added to the fact that the automobile was proceeding toward the robbery scene when it was stopped two miles distant therefrom at least forty-five minutes later—can it be said that there is probable cause?

McCray v. Illinois, 386 U.S. 300 (1967), relied upon by the court below, is inapposite. On the date of and prior to the arrest the police officers conversed with a reliable informant who had previously furnished information on 20 prior occasions, who advised them that McCray was "selling narcotics and had narcotics on his person and that he could.

be found in the vicinity of 47th and Calumet at this particular time." The officers drove to that location in the police car with the informant. The informant pointed out McCray who, after seeing the police, hurriedly walked between two buildings. Defendant was arrested without warrant for possession of narcotics. A warrantless search of his person uncovered a package of heroin, the possession of which led to his indictment.

The Court distinguished *Beck* on the basis that each of the officers specifically stated what the informer had said and why the officer thought the information was creditable. Here, as in *Beck*, this fundamental information is missing.

The district court relied upon *McCray, supra*, and *Ker v. California*, 374 U.S. 23 (1963). The amount and quality of the information available in *Ker* clearly shows the inadequacy of the information here. In *Ker* the police officers observed a rendezvous between persons trafficing in drugs which was a virtual reenactment of a previous night's staged purchase of drugs by a police officer who had witnessed the event and who participated in the arrest. The identity of the surrounding circumstances to the previous night's sale of narcotics, coupled with information from an informant whose reliability was established, was found to establish probable cause for arrest without a warrant.

Draper v. United States, 358 U.S. 307 (1959), cited by the Court in *Ker*, is frequently cited in connection with the issue of probable cause for arrest. Again we find that the arresting officer had considerably greater information than that available in the instant case. The information was given by a "special employee" of the narcotics squad (paid informer) who always had been accurate and reliable in the past. The informant gave the two alternate times of arrival by train in a certain station, an exact physical description of defendant's personal clothing, that defendant would be carrying a tan leather bag with narcotics and he habitually walked "fast". This knowledge forces the conclusion that probable cause existed.

The strength of the evidence in these cases illustrates the basis for belief that there was no probable cause.[31]

B. The searches and seizures, not being incident to a lawful arrest, were unreasonable.

In his pro se brief filed with the court of appeals, petitioner relied upon *Preston v. United States,* 376 U.S. 364 (1964) in arguing the unreasonableness of the searches and seizures and the subsequent admission of the seized items into evidence at his trial.[32] The court of appeals concluded that petitioner's reliance on *Preston* was misplaced[33] and affirmed the district court's application of *United States v. Dento,* 382 F.2d 361 (3rd Cir. 1967). We submit that this Court should disapprove of *Dento,* apply *Preston* and reverse the lower court.

Preston labelled unreasonable the search of an automobile occupied by Preston and two companions, one of whom was the alleged owner. After giving unsatisfactory explanations for their presence in a business district at 3:00 o'clock, A.M., the three men, including Preston, were arrested for vagrancy and their persons searched for weapons. The men and the car, *which had not been*

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[31] This review of the facts incident to the arrest, the searches and seizures, buttresses the contention that petitioner was prejudiced by late appointment of counsel. With adequate time to prepare, petitioner's counsel could have filed a motion to suppress to test probable cause, as was done in *Beck v. Ohio,* supra, *McCray v. Illinois,* supra, and *Draper v. United States,* supra. The lower court therefore erred when it concluded that "Appellant's contention that his arrest without a warrant was invalid was not involved with the question of ineffective counsel." 408 F.2d at 1192.

[32] Petitioner as a passenger has standing to contest the reasonableness of the search. Although many commentators have concluded that Preston was the owner of the searched automobile, in fact he was a passenger. See Record at 59, 117, 118, *Preston v. United States, supra.*

[33] 408 F.2d at 1192.

searched at the time of the arrest, were taken to the police station. After Preston and his companions were "booked" at the police station, the police officers searched the car and found two loaded revolvers. Unable to open the trunk of the car, they returned to the station and received advice from one of their fellow officers. Returning to the car, they found caps, an illegally manufactured license-plate and other items that could have been used in connection with a robbery.

This Court determined that the search and seizure were unreasonable, noting that when a person is lawfully arrested, the police's right to search without a warrant is justified:

> ". . . to seize weapons and other things which might be used to assault an officer of effect an escape, . . . [or] to prevent the destruction of evidence of the crime. . . ." 376 U.S. at 367.

This Court then flatly stated that:

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 376 U.S. at 367.

This general rule was amplified by the Court:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place. See Stoner v. California, 376 U.S. 483. The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be 'fruits' or 'implements' of the crime of vagrancy." 376 U.S. at 367, 368.

Application of the *Preston* doctrine to the instant facts discloses that neither basis for the warrantless search was present. Petitioner and the owner of the vehicle were inside the police station, in no position to obtain weapons, to escape, or to destroy any evidence which may have been lodged in the vehicle. Additionally, unlike *Preston*, a search of the vehicle had already been made *prior to the time petitioner and his companions were taken into the station.*[34]

In *Dento, supra,* relied upon by the courts below, defendant attempted to pass a counterfeit twenty dollar federal reserve note in a food market. The cashier noted that its serial number matched that on a warning list distributed by the U.S. Secret Service. She followed the defendant out of the store and with the aid of a pedestrian obtained the license number of his automobile. Ownership of the vehicle was traced and the information disseminated to police in the locality where the car was registered to defendant under an assumed name. Thereafter, police officers, who knew defendant and his identity observed him

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[34]This Court recently reiterated the holding in *Preston* and affirmed the bases for warrantless search incident to an arrest and its proper extent in *Chimel v. California,* 395 U.S. 752, 762, 763 (1969) as follows: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officers' safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he must gain possession of a weapon or destructible evidence. . . . This is the principle that underlay our decision in Preston v. United States, 376 U.S. 364."

driving his car and motioned him to the side of the road. They saw him lean forward and, apparently, place something under the front seat. He was arrested and taken to the police station. For reasons of safety the car was not searched at the place of arrest, but was searched at a police barracks and counterfeit money seized.

In finding that the search and seizure were reasonable the court of appeals in *Dento* distinguished *Preston* on the basis that:

> "First, unlike Preston, the instant search was substantially contemporaneous with the arrest (the entire arrest and search procedure was completed within twenty minutes). Secondly, there was a reasonable nexus between the offence for which the defendant was arrested for and the search of his automobile, where as in Preston the search was entirely unrelated to the arrest on the charge of vagrancy." 382 F.2d at 365, 366.

Neither of these matters, substantial contemporarity and reasonableness, is an element of the *Preston* rule which excuses the need for a search warrant solely on the necessities implicit in an arrest, *viz*: the suspect may attempt to escape, harm the officer, or destroy evidence. Once the suspect is safely in custody and these dangers no longer exist, a warrant must be obtained.[35]

Wood v. Crouse, 417 F.2d 394 (10th Cir. 1969),[36] involving facts similar to *Dento*, reviewed *Dento* and ably stated the error of that decision:

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[35] See also: *Dyke v. Taylor Implement Mfg. Co., Inc.*, 391 U.S. 216 (1965); *Colosimo v. Perini*, 415 F.2d 804 (6th Cir. 1969); *United States v. Holsey*, 414 F.2d 458 (10th Cir. 1969).

[36] In *Wood*, police were advised to look out for a certain described vehicle whose occupants had attempted to utter a check taken by them during a burglary. Police apprehended the vehicle and arrested Wood and a co-defendant. Shortly after the two suspects were taken to jail the vehicle was taken to the police station, where a search within twenty minutes of the arrest uncovered many checks taken in the previous burglary were seized.

"This court cannot be persuaded by such artificial attempts at distinction without a difference. The Court in Preston in no way indicated that the time factor, *i.e.*, the precise time period between arrest and search, was to be controlling. In fact, the Cout did not indicate the amount of time involved except to note that the search was 'soon after' the defendants had been booked at the station. Timing is significant only in the sense that the search is either at the time of the arrest or it is not; if it is not, it is irrelevant whether the elapsed time is twenty minutes or twenty hours. Rather, the crucial distinction, clearly indicated in Preston, is that if the search is not made at the time of the arrest, but is conducted at a later time when the vehicle is in custody and its occupants in jail, then the justification for an incidental search, *e.g.*, the need to preserve evidence, protect the arresting officers, and prevent escape, no longer obtains and a warrant must be secured. Obviously, the absence or presence of a justification for the search will not depend solely upon whether the delay is brief or lengthy. Accordingly, it is the existence or nonexistence of a justification for a warrantless search—not the mere passage of time—that is determinative.

"The second distinction attempted in Dento, namely, analysis of the nature of the relationship between the offense prompting the arrest and the later search, can have significance in determining whether the search was reasonable only as it relates to probable cause. The court in Dento must have intended to indicate that the subsequent search is valid when closely related to the reason for the arrest because when so related there is probable cause for the search. *Cf.*, United States v. Butenko, 384 F.2d 554, 566 (3d Cir. 1967), vacated, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. The difficulty with that position is that it misconceives the function of probable cause in this context. Thus, the fact that officers have probable cause does not dispense with the requirement of a search warrant. Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961). Consequently, it is not

> the existence of probable cause, but the presence of factors justifying the failure to procure a warrant that is critical. When so viewed it becomes apparent that the relationship between the offense and the search is of no consequence since that relationship can have little bearing on the feasibility of the first obtaining a search warrant.
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> "In brief, both distinctions propounded in Dento overlook the fact that a search without a warrant is valid if incidental to an arrest only because the need to protect the officers, and other similar practical considerations, justify an exception to the general requirement that a warrant is a precondition to a valid search. When the justification is lacking, as in the case at bar where the vehicle was in police custody and its occupants in jail, then regardless of the time involved or the existence of probable cause for the search, a search without a warrant is simply not incident to the arrest. We must therefore conclude 'that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.' Preston v. United States, 376 U.S. at 368, 84 S.Ct. at 884." 417 F.2d at 397, 398 (footnote omitted).

We urge this court to disapprove *Dento, supra,* and reverse the lower court's refusal to apply *Preston.* The search of the vehicle occupied by petitioner and the seizure of items therefrom were unreasonable under the Fourth and Fourteenth amendments. Once petitioner and his companion were taken into the station house, the police officers were no longer in danger and the suspects could not destroy evidence in the automobile. The searches, thereafter, and the seizures were necessarily remote and could be lawfully made only with a search warrant.[37]

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[37]The circuit court held: "Thus, the failure to file a pre-trial motion to suppress the evidence as to the revolvers was not prejudicial because, on the merits, it would undoubtedly have been decided against appellant. More importantly, the lower court and the district

[continued]

III.

THE ADMISSION IN EVIDENCE OF DUM-DUM BULLETS SEIZED FROM PETITIONER'S HOME WAS NOT HARMLESS ERROR WHERE THE BULLETS WERE MATCHED TO THOSE TAKEN FROM A REVOLVER SEIZED IN A PRIOR UNREASONABLE SEARCH AND THE POLICE OFFICER WAS PERMITTED TO TESTIFY REGARDING THE EFFECT OF SUCH BULLETS ON A HUMAN BODY.

Following petitioner's arrest, the police obtained a search warrant and searched the residences of each of the four occupants of the automobile (A. 126). Searches of the homes of the other suspects did not result in any seizures (A. 126, 127). Petitioner's home was searched approximately eight hours after the arrest and a brown leather revolver holster, one box of .33 caliber Smith & Wesson cartridges and some loose .38 caliber cartridges were seized (A. 127, 128, 131).

No pre-trial motions to suppress this evidence were filed. At the first trial in early September of 1963, petitioner's lawyer objected to the introduction of the .38 caliber ammunition. The objection was sustained (A. 82). The basis for the objection and for sustaining the same are not disclosed in the record.

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court *did* examine this particular issue on the merits and concluded the evidence was admissible." 408 F.2d at 1193 (emphasis by the court).

The district court's review, in one paragraph, of this contention refers to no facts and cites *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Ker v. California, supra*, 281 F.Supp. at 100.

The lower state court's discussion of the issue erroneously states that within "a few minutes" of the arrest the "stolen articles and guns used in the robbery were found". The court does not refer to any decision of this Court on the matter of searches and seizures but concluded, citing a state case, *Commonwealth v. Smith*, 201 Pa. Super. 511, 193 A.2d 778 (1963), that "immunity from unreasonable search is personal and a defendant cannot object to the search of another's premises or property." This was erroneous. *Preston v. United States, supra.*

In petitioner's second trial on the same charges, the Commonwealth offered the seized ammunition into evidence: Petitioner's then counsel, referred the court to the exclusion of this evidence at the earlier trial (A. 82),[38] and objected on the grounds that: (1) the evidence was irrelevant (A. 82) and (2) the search warrant did not describe specifically the items seized.[39] Apparently, the search warrant was available at trial (A. 129) but was lost before the state habeas corpus hearing and has not been found.[40]

The federal district court assumed that the warrant was invalid and treated the admission of the ammunition as constitutional error.[41] The circuit court made a similar

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[38]Mr. Tamburo only became aware of the existence of the search warrant on the morning of trial (A. 130).

[39]The state trial court overruled this objection on the grounds that petitioner's counsel had failed to file preliminary motions before trial in the form and within the time required by the Pennsylvania Superior Court and that, in fact, a search warrant was unnecessary anyway. (A. 130, 131).

[40]The testimony at trial contains the following:

> Question. (Petitioner's counsel) "Do you have the search warrant here in court?
>
> Answer. (Officer Haverly) Yes sir." (A. 129)

Judge Graff, however, in his opinion in the state habeas corpus proceedings, stated: "Unfortunately, this search warrant is not available and was not at the time of trial." (A. 267)

[41]281 F.Supp. at 98, n.4, referring *inter alia*, to the following testimony:

> Question: (Petitioner's counsel) "You didn't know that there were going to be any bullets in the Chamber (sic) house when you went there, did you?
>
> Answer: (Officer Haverly) No sir.
>
> Question: You were just there to see what you could find, is that right?
>
> Answer: Right.
>
> Question: There is nothing on that search warrant that in any way indicates you were looking for bullets, is that right?
>
> Answer: No sir." (A. 132)

assumption.[42] Both courts then held that the violation of the Fourth Amendment was harmless error under *Chapman v. California, supra.*

In *Chapman* this Court stated the test of harmless error:

> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

The *Chapman* court amplified its ruling relating to harmless error made in *Fahy v. Connecticut,* 375 U.S. 85 (1963):

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy,* be conceived of as harmless. Certainly error, constitutional error, is illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it, a burden to show that it was harmless. It is for that reason that the original common law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement and *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24, 25.

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[42] The circuit court also quoted the state habeas corpus judge to the effect that the ammunition was admissible if it had a reasonable relation to the search. 408 F.2d at 1194, n.26, 1195.

We recognize that this Court, not having the warrant before it, may conclude that the record is inadequate on this issue since it does not manifest what, if any, language appeared on the face of the warrant describing the subject of the search. If the court so finds, we submit this forms further proof of the circuit court's failure to observe the criteria of *Townsend v. Sain, supra.*

In petitioner's trial one police officer was permitted to testify that during the search of petitioner's residence he found a brown leather holster, containing one box of thirty-three .38 caliber Smith & Wesson cartridges and some loose .38 caliber cartridges some of which were loaded with dum-dum bullets (A. 127, 128). The bullets were admitted into evidence (A. 128, 129). The police officer then testified that the cartridges could have been used in the two revolvers, exhibits 1 and 3. Thus petitioner alone, of the four tried, was linked with two revolvers.[43] We submit that no court could find that this error was harmless.

But this evidence and testimony was not the only prejudice suffered by petitioner as the result of the illegal search. The searching police officer testified that some of the cartridges contained dum-dum bullets, the first that he had seen in his twenty-seven years' experience (A. 132). Another police officer testified that four dum-dum bullets, exhibit 8, were removed from one of the revolvers found in the search of the automobile (A. 132, 133).

Further prejudice ensued when one of the police officers described the effect of a dum-dum bullet as contrasted with a regular bullet for a .38 caliber revolver:

> Question: (Prosecutor) "The bullet, itself, what is the difference between the Dum-dum shown in the long shell, and the regular bullet, shaped bullet, in the short?
>
> Answer: (Officer Haverly) Well, you take that bullet will go right through you; take that Dum-dum bullet, it will make a hole going in and a bigger hole going out.
>
> Question: This Dum-dum flattens out when it gets in your body?
>
> Answer: If it hits an obstruction of any kind like a bond." (A. 128)

---

[43]The only other evidence to connect petitioner with the revolver was the testimony of the witness Havacon who identified petitioner as one of the robbers and asserted that he had been threatened with a chrome plate revolver similar to exhibit No. 1.

The district court believed that the other evidence was adequate to support petitioner's conviction,[44] but completely ignored the patently prejudicial effect of the bullets which forged the conclusive link between petitioner and the revolvers and formed the basis for the inflammatory "dum-dum" remarks by the police officer. Without the benefit of a transcript of the prosecutor's closing argument to the jury, we can only speculate as to what he may have said about the evidence.[45] But the police officer's description of their effect on the human body, in itself, can only be viewed as prejudicial.

The circuit court and district court erred in finding the recited testimony and the admission of the seized evidence as error—harmless beyond a reasonable doubt—since this evidence and testimony must have contributed to petitioner's conviction.

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[44]The district court stated: "In the light of the eyewitness identification of relator, the recognition of the revolvers, the glove full of change and the personal cards found in the stationwagon, and the factor of the green sweater, we are convinced that beyond a reasonable doubt the alleged error committed in the admission of the .38 caliber bullets was harmless." 281 F.Supp. at 99.

[45]Unlike the instant matter where the opening and closing remarks of counsel for the Commonwealth and the defendants were not transcribed, the appendix to the opinion of the court in *Chapman* quotes at length the statements and references of the prosecutor to the prejudicial matter. Thus, we are unable to determine what use the prosecutor made of the inferences to be drawn from petitioner's possession of a holster and the dum-dum bullets.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

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Dated: March 16, 1970

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*Petitioner's counsel wishes to acknowledge the valuable assistance of third year law students, Bernard L. McGinley, II and Stanley M. Stein, of the University of Pittsburgh School of Law and Duquesne University School of Law, respectively, of Pittsburgh, Pennsylvania in connection with this Brief.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 830

FRANK CHAMBERS,
Petitioner,

v.

JAMES F. MARONEY, Superintendent, State Correctional Institution at Pittsburgh, Pennsylvania,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

v.

JAMES F. MARONEY, Superintendent, State Correctional Institution at Pittsburgh, Pennsylvania,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the District Court (A. 308-315, inclusive) is reported at 281 F. Supp. 96 (W. D. Pa. 1968). The opinion of the Court of Appeals (A. 320-336, inclusive) is reported at 408 F. 2d 1186 (3rd Cir. 1969).

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit (No. 17219) was entered on January 22, 1969. A petition for writ of certiorari, in forma pauperis, was filed before your Honorable Court on March 25, 1969 at No. 1781 Misc., October Term, 1968. The An-

swer to Petition of Certiorari and Brief for Respondent were filed on July 14, 1969. The writ was granted on November 10, 1969. The jurisdiction of this court rests upon 28 U. S. C. 1254 (1).

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

I. Whether the petitioner was deprived of the effective assistance of counsel at trial where the record reveals affirmative proof beyond a reasonable doubt that petitioner was not prejudiced by the late appointment of counsel?

II. Whether the search of the automobile in which petitioner was an occupant was reasonable since it was conducted incident to a lawful arrest though momentarily later at a place which provided safe conditions for police officers?

III. Whether the admission into evidence of revolver shells seized in petitioner's apartment during a search conducted pursuant to a warrant which did not list shells as being among the items to be seized was legal or alternatively, constituted harmless error?

Counter-Statement of the Case

A. The Circumstances of the Criminal Conviction.

Petitioner was indicted at No. 78 June Sessions 1963 and at No. 91 June Sessions 1963, in the Court of Oyer & Terminer of Allegheny County, Pennsylvania. Each indictment set forth the charges of armed robbery and receiving stolen goods. Petitioner entered a plea of not guilty and was represented by court-appointed counsel Vincent Tamburo, Esq., of the Legal Aid Society. On September 27, 1963, trial was commenced before Judge J. Frank Graff, Specially Presiding, and a jury. The jury found petitioner guilty as to both indictments. Judge Graff sentenced petitioner at No. 78 June Sessions 1963, to undergo a term of imprisonment of not less than four or more than eight years. This sentence was to be served concurrently with the sentence previously imposed at No. 58 June Sessions 1963. At No.

91 June Sessions 1963, Judge Graff sentenced petitioner to undergo a term of imprisonment of not less than two or more than seven years. This sentence was to be served consecutively to the sentence imposed at No. 78 June Sessions 1963.

No direct appeal was taken to the appellate courts of Pennsylvania.

The facts of these crimes may be briefly and accurately summarized as follows:

(1) Indictment at 78 June Sessions 1963; armed robbery (first count); receiving stolen goods (second count).

Raymond Havicon, Manager of a Boron Oil Company Service Station in Turtle Creek, Pennsylvania, testified that at approximately 2:20 A. M. on May 13, 1963, two colored men entered the office of the station and requested change to purchase a package of cigarettes. When he had given them change, one of the men drew a revolver and demanded that the witness give them more money. The robbers then forced the witness to remove his trousers and to go into the back room (A. 20). The robbers fled, taking $66.00 and Mr. Havicon's driver's license, registration card and various other cards (A. 21). Mr. Havicon was a former police officer and recognized the revolver as being a .38-caliber revolver which he identified at trial (A. 22). He also identified the various cards which had been taken from him (A. 23). The witness positively identified petitioner as the robber who drew the revolver (A. 23). Mr. Havicon testified that he had seen the petitioner for approximately "2 to 3 minutes" and that he had previously identified petitioner in another trial and in the police lineup (A. 30).

Joseph Reddington, a McKeesport police officer, testified that petitioner had been delivered into the custody of the McKeesport police by North Braddock police (A. 36).

(2) Indictment at 91 June Sessions 1963; Armed Robbery (first count); Receiving Stolen Goods (second count).

Stephen Kovacich, an employee of a Gulf Service Station in North Braddock, testified that at approximately 11:45 P. M. on May 20, 1963, two men approached the station and forced him to go into the office (A. 54). Both of these men were armed with revolvers. The witness gave the robbers a quantity of change which he had placed in a single righthand glove (A. 55). The witness identified the revolvers and the glove at trial (A. 56). He also stated that one of the robbers was wearing a green sweater and the other a light trench coat (A. 57). The robbers fled, taking with them $48.00 (A. 58). Although this witness had identified petitioner as one of the robbers the day after the robbery (A. 59), he was unable to identify petitioner at trial because he was new wearing glasses, different clothes and had shaved off his mustache (A. 59).

Linda Oschinick, 14 years of age, testified that she and a friend, Jerry Klaus, were walking in the neighborhood of this Gulf station on May 20, 1963, at approximately 12:00 A. M. and noticed a blue station wagon, with four colored men occupying it, parked in a Kroger's parking lot near to the service station (A. 39). She stated that she had seen this station wagon circling the block, where the Gulf Service Station was located, five or six times. She was unable to identify petitioner as one of the robbers, but stated that one of the men she had seen in the blue station wagon was wearing a light trench coat and that another was wearing a green sweater (A. 43).

Jerry Klaus, 17 years of age, who had been in the company of Linda when she had seen the blue station wagon, confirmed her testimony. He further testified that he learned of the robbery of the Gulf Service Station immediately after it occurred and then observed a blue station wagon leaving the Kroger parking lot where he had previously noticed it parked, at approximately "forty-five or fifty m. p. h." (A. 52).

North Braddock Police Officers arrived at the scene of the crime at 11:52 P. M., obtained descriptions of the robbers and their car, and immediately broadcasted this description by police radio (A. 84).

Lee Herman and Hugh Hagan, Swissvale Police Officers, testified that they stopped a blue station wagon at approximately 12:30 A. M., May 21, 1963, at the request of the North Braddock Police (A. 71-72). Petitioner was an occupant of this automobile (TT. 101). Swissvale and North Braddock are located in the same part of Allegheny County.

Theodore Wagner, a North Braddock Police Officer, testified that when he arrived at the scene of the arrest petitioner was wearing a green sweater (A. 85). The officer escourted petitioner and a co-defendant in the light blue station wagon to the North Braddock police station (A. 87). The defendants were then searched (A. 87). They were questioned and the automobile was searched. During the course of this search, officers discovered the revolvers used in the robbery and the glove full of change hidden in a vent under the dashboard (A. 90). The officers also found the cards which had been stolen from Raymond Havicon in the Boron service station robbery the preceding week (A. 91). Charles Cassidy, another North Braddock police

officer, confirmed Officer Wagner's testimony regarding the search (A. 107).

Petitioner had $46.00 on his person when he was arrested (A. 92). Petitioner refused to answer the officer's questions (A. 93). Officer Wagner also testified that petitioner looked different at the arrest than he did at trial (A. 93-94). Guy Cicco, a North Braddock Officer, testified that petitioner denied participating in this robbery (A. 117).

James Heverley, another North Braddock Officer, testified over the objection of petitioner's counsel (A. 127), that when petitioner's home was searched, .38-caliber bullets were found (A. 127). On cross examination, Officer Heverley admitted that the search warrant for petitioner's residence did not mention bullets and that the officers did not know that they would find bullets in petitioner's home (A. 132). These bullets were admitted into evidence.

B. Collateral Attack in the State Courts.

Petitioner made application for habeas corpus relief in the Court of Common Pleas of Allegheny County, Pennsylvania. The allegations of the petition were that:

(1) A search of the car was illegal in that the officers had no search warrant and that the search was remote.

(2) The search warrant for his residence was defective as it did not describe, with particularity, the property the officers expected to find.

(3) He was denied a fair trial in that he was convicted of both armed robbery and receiving stolen goods.

(4) Because of the "belated appointment" of his court-appointed counsel, said counsel was ineffective.

F. Peter Dixon, Esq., was appointed to represent petitioner and he filed amendments to the petition contending

that petitioner had been arrested without probable cause, and that the introduction of evidence found in petitioner's home was illegal in that the search warrant was invalid.

At the hearing on May 13, 1966, before Judge Graff, petitioner testified that the car in which he was arrested belonged to his companion, Mr. Lawson (A. 259). Petitioner testified that he had first seen Mr. Tamburo, his trial counsel, just prior to the commencement of his trial (A. 256). At this hearing, Mr. Dixon indicated that petitioner was abandoning the contention that his trial counsel was ineffective. He stated that the only reason he had questioned the petitioner on this point was to counter the District Attorney's contention that petitioner was not entitled to collateral relief as he had failed to file a timely suppression motion (A. 258).

Judge Graff dismissed the petition as being without merit. The Superior Court of Pennsylvania affirmed the Order of the lower court in a per curiam opinion: *Commonwealth ex rel. Chambers v. Duggan*, 210 Pa. 718, 231 A. 2d 425 (1967). The Supreme Court of Pennsylvania denied allocatur at No. 2193A Miscellaneous Docket. Petitioner raised the same issues on appeal as he had in the lower court.

C. Collateral Attack in the Federal Courts.

In his petition for writ of habeas corpus at No. 67-1050, appellant alleged that:

1. There was no probable cause for his arrest;
2. There was no search warrant for the search of the car in which he was arrested;
3. The evidence seized in his apartment pursuant to a search warrant was not named in the warrant and was therefore not properly introduced into evidence at his trial;

4. Trial counsel was inadequate because of his belated appointment.

A hearing was held on December 4, 1967 at which time the records of the proceedings in the state courts were introduced into evidence. On the basis of these records, Judge Marsh dismissed the petition.

On March 6, 1967, Judge Marsh granted a Certificate of Probable Cause to Appeal. On January 22, 1969, the United States Court of Appeals for the Third Circuit affirmed the order of the District Court at No. 17219.

Summary of Argument

I.

Petitioner's right to the effective assistance of counsel was not denied even though he first met his appointed counsel on the morning of trial.

A. The Circuit Court of Appeals was correct in holding that the tardy appointment of legal counsel raised the prima facie presumption of ineffective counsel. In addition, the Circuit Court correctly permitted the Commonwealth to rebut that presumption by adequate affirmative proof from the trial record that no actual prejudice resulted. In adopting the adequate affirmative proof test, the Court of Appeals in effect applied the same standard that your Honorable Court set forth in *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824 (1967), the harmless error rule. Since a thorough review of the evidence upon which petitioner's conviction was based did not uncover any prejudice because his counsel was belatedly appointed, the Circuit Court correctly denied petitioner's claim without an evidentiary hearing.

B. Assuming arguendo that the Court of Appeals adopted the proper standard of proof, the Court of Appeals correctly held that an examination of the trial record supported the District Court's finding that no actual prejudice resulted. Petitioner's arguments that his counsel was precluded from filing essential pre-trial motions to suppress evidence are without merit since his counsel was able to object at trial and the District Court and Circuit Court specifically reviewed this challenged evidence to determine its admissibility. Both the District Court and the Circuit Court found that the evidence was properly admitted. The allegation of actual prejudice is without merit since petitioner is unable to support the allegation in the record.

II.

The search of the automobile in which petitioner was an occupant was reasonable since it was conducted incident to a lawful arrest though momentarily later at a place which provided safe conditions for police officers. The trial court did not err in admitting into evidence instrumentalities and fruits of the crime which were found within the automobile.

A. The record shows that the arresting police officers had sufficient probable cause to arrest petitioner. Petitioner's physical coloring and attire matched perfectly the description given by the holdup victim. The car in which the petitioner was riding when apprehended fit the description given of an automobile which was seen circling the area of the robbery many times at the time of the robbery and which left a parking lot across the street from the robbery at a high rate of speed immediately after the robbery. The description of one of the occupants of this automobile matched petitioner's description and a

further description of the second robber and one of the automobile's occupants matched one of the occupants of the automobile in which petitioner was apprehended. In addition, the apprehended vehicle attempted to elude police officers.

B. The search and seizure of items from the automobile was conducted incident to the lawful arrest. The arrest occurred at a dimly lit parking lot at approximately 12:30 A. M. The automobile was not searched until it had been driven to the police station by one of the petitioner's co-defendants. The search was reasonable because it took place substantially at the time of the arrest and emergency circumstances necessitated that the search be held at a well-lighted area which was safe for police officers.

III.

The trial court correctly admitted into evidence bullets taken from petitioner's home during a search conducted pursuant to a valid warrant. Alternatively, if the admission is held to be error, it is merely harmless error. Even though the search warrant did not specifically list shells as being the items to be located, the police officers correctly seized the .38 caliber bullets since these bullets were intimately related to the offenses charged, armed robberies. The guns previously located in the car in which petitioner was a passenger were .38 caliber revolvers. If error, the admission of the bullets is merely harmless error since there was overwhelming evidence of petitioner's guilt, including eye-witness identification of the petitioner and the admission of the instrumentalities and fruits of the crime found in petitioner's possession.

ARGUMENT

I. The Petitioner was not Deprived of the Effective Assistance of Counsel at Trial where the Record Reveals Affirmative Proof Beyond a Reasonable Doubt that Petitioner was not Prejudiced by the Late Appointment of Counsel.

A. The Circuit Court did not err in holding that the Commonwealth could rebut petitioner's presumption of ineffective assistance of counsel from the belated appointment of counsel by a showing by adequate affirmative proof that petitioner was not actually prejudiced.

Petitioner alleges that the mere potentiality of prejudice from the belated appointment of counsel mandates the reversal of his conviction. Petitioner cites numerous cases in which your Honorable Court effectuated the Sixth Amendment's right to counsel provision. Further, petitioner enumerates several alleged failures by his trial counsel to file pre-trial motions to suppress evidence and to assert at trial timely objections to the admission of evidence in an effort to prove that actual prejudice occurred.

The Commonwealth denies that the mere potentiality of prejudice warrants reversal and contends that the Circuit Court applied the proper standard of proof in determining whether in actuality the petitioner was prejudiced. While the Commonwealth agrees with the holding of the Circuit Court[1] that the tardy appointment of legal counsel raised the prime facie presumption of ineffective counsel herein, the Commonwelath contends that the record clearly rebuts the allegation of ineffective assistance of counsel.

Initially, the Commonwealth avers that while petitioner met his court-appointed counsel, Vincent Tamburo, Esq.

[1] The opinion of the District Court does not specifically deal with this question, possibly because petitioner's counsel at the State habeas corpus hearing abandoned this contention.

of the Legal Aid Society, in the hallway adjoining the courtroom on the morning of trial, the record shows that defense counsel had been appointed to represent petitioner on these charges on some prior date. While petitioner was lodged in the Allegheny County Jail in the five-month period prior to trial, he was apparently visited by a representative of the Legal Aid Society (A. 258). Three weeks prior to the trial now in question petitioner was represented by Legal Aid Attorney Middleman at a trial on these same charges which ended in a mistrial. It can be presumed that Mr. Tamburo had access to any investigatory files of the Legal Aid Society and to the trial notes of Mr. Middleman. Indeed, Mr. Tamburo's arguments at trial clearly indicate that he was familiar with the facts of petitioner's case (A. 82-83).

Since petitioner's counsel at the state habeas corpus hearing abandoned the contention of ineffective assistance of counsel[2] and the Commonwealth did not therefore offer the testimony of Mr. Tamburo,[3] no other facts are available to determine the amount and the quality of the preparation for trial pursued by Mr. Tamburo or the amount of evidentiary material known by and available to him in determining what, if any, evidentiary objections were mandated or what, if any, defenses were available to petitioner.

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[2] Because of the serious constitutional challenge which this problem presents and which was recognized by the Circuit Court, the Commonwealth will abandon any previously raised contention that procedurally the issue is not properly before your Honorable Court.

[3] In its Answer to the Petition for Writ of Habeas Corpus in the State Court proceeding, the Commonwealth alleged that:

> Mr. Tamburo, his counsel, was a member of the Legal Aid Society. The Legal Aid Society was named long before the date of the trial to represent this petitioner. It had been the practice of the Legal Aid Society to send one of its investigators to interview those whom they were appointed to represent. In this case, the Legal Aid Society would send an investigator to interview the petitioner, they would secure all the facts in connection with these charges. These facts were reduced to writing in a written report, and this report was turned over to Mr. Tamburo (A. 294).

To the knowledge of the Commonwealth, your Honorable Court has never ruled upon the procedural steps utilized in the State Courts or in the Federal District Courts to determine whether a belated appointment of counsel necessitates the reversal of conviction.[4] The Commonwealth respectfully suggests that the procedure adopted by the Third Circuit,[5] as originally developed in the Fourth Circuit, adequately protects indigent defendants from the ineffective assistance of counsel at trial due to the belated appointment of defense counsel to represent them.

In *United States ex rel. Mathis v. Rundle*, 394 F. 2d 748 (3rd Cir. 1968), the Third Circuit Court established a definite standard for the determination of the issue of ineffective assistance of counsel in belated appointment cases. In *Mathis*, defense counsel was appointed to represent the defendant on the night before trial. Despite the short period of time for preparation, the court held the prima facie presumption of denial of effective assistance of counsel due to belated appointment was effectively rebutted. *Mathis* established for the Circuit the rule that belated appointment of counsel is inherently prejudicial and is prima facie a denial of effective assistance of counsel. The burden of proving a lack of actual prejudice is then shifted to the prosecution. The *Mathis* Court relied heavily upon Fourth Circuit decisions in *Fields v. Peyton*,

[4] Neither *Powell v. Alabama*, 287 U. S. 45 (1932) nor *Avery v. Alabama*, 308 U. S. 444 (1940) set procedural guidelines for determining prejudice in belated appointment cases. In *Avery*, the Court held that a denial of the opportunity to confer with the accused and to prepare a defense *could* violate the defendant's right to counsel.

[5] In the state courts and in the District Court, the Commonwealth relied upon *Commonwealth ex rel. Dion v. Tees*, 180 Pa. Superior Ct. 82 at 82, 118 A. 2d 756 (1955) and *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, at 608, 235 A. 2d 349 (1967), which expressly rejected the contention that only a brief opportunity for consultation alone constituted the ineffective assistance of counsel. In addition, as the Court of Appeals points out, the Pennsylvania Supreme Court in *Washington* also expressly refused to place the burden of proof upon the Commonwealth in this type of case. 408 F. 2d, n. 12 at 1190.

375 F. 2d 624 (4th Cir. 1967); *Twiford v. Peyton*, 372 F. 2d 670 (4th Cir. 1967); and *Martin v. Virginia*, 365 F. 2d 549 (4th Cir. 1966).

Clearly the burden upon the prosecution requires adequate affirmative proof that no actual prejudice resulted. The Commonwealth contends that this standard is a severe one and requires a showing of no actual prejudice beyond a reasonable doubt, the identical standard your Honorable Court has adopted in determining whether federal constitutional error can be held to be harmless, *Chapman v. California*, 386 U. S. 18, 87 S. Ct. 824 (1967). Where a thorough review of the evidence upon which a conviction was based does not uncover any prejudice to the defendant because his court-appointed counsel was belatedly appointed and allegedly inadequately prepared, the Commonwealth maintains that the defendant has no grounds upon which to base an ineffective counsel claim.

Martin v. Virginia, 365 F. 2d 549 (4th Cir. 1966) clearly sets forth the procedural problem once the allegation is made. *Martin* requires the District Judge, as the trier of fact, to determine whether the danger of prejudice was so great as to warrant a new trial. Each case must stand or fall on its own merit:

> In some instances the court may find that the danger of prejudice arising from the lack of opportunity for preparation is minimal, cf. *Turner v. State of Maryland, supra.* In others even an interval much longer than one day may afford insufficient time for adequate investigation and reflection. *Cf. Edgerton v. State of North Carolina, supra. Martin v. Virginia*, 365 F. 2d at 554.

To hold as petitioner requests that the mere allegation of the belated appointment of counsel warrants a new trial would serve to render void those conviction validly secured

without actual prejudice to a defendant but where trial counsel was appointed at some short period prior to trial, despite the fact that defense counsel appointed months before trial could not have effectuated a different result.

In addition, the adoption of the rule that petitioner propounds would require the setting of specific time periods within which counsel may be appointed prior to trial. To leave the determination of these time period to the states or to the circuits would of necessity require an investigation on an *ad hoc* basis into these time periods in the great avalanche of post-conviction hearings which would necessarily follow such a decision. Thus the individual judge would have to investigate the record and make an individual judgment of the effect of the time period upon trial in each case, precisely what petitioner opposes.

Placing the burden of proof upon the prosecution in any collateral attack where "belated appointment" of counsel is raised is not entirely satisfactory. In effect, this means that counsel who were in an adversary relationship at trial may, in a collateral attack, find themselves attempting to support one another in the tactics employed by one of them. This becomes particularly difficult where a significant percentage of the cases are handled by defender associations. This requires that the District Attorney's Office must oppose the Public Defender's Office at trial and perhaps support its tactics in a subsequent collateral attack. This knowledge is bound to have an effect upon the prosecutor's conduct at trial and ultimately, therefore, upon the adversary system.

Petitioner's reliance upon cases in which your Honorable Court refused to adopt an actual prejudice rule is misplaced. These cases are not apposite to the belated ap-

pointment cases: *Sheppard v. Maxwell,* 384 U. S. 333, (1966) and *Estes v. Texas,* 381 U. S. 532 (1965) (prejudicial publicity); *Glasser v. United States,* 315 U. S. 60 (1942) (representation by counsel of defendants with conflicting interests); *White v. Maryland,* 373 U. S. 59 (1963) and *United States v. Wade,* 388 U. S. 219 (1966) (total absence of counsel at a critical pre-trial stage of the proceedings and at a stand-up).

Consequently, the Commonwealth respectfully requests that your Honorable Court adopt the *Mathis* rule, thereby permitting inquiry into whether or not actual prejudice occurred.

B. The Court of Appeals correctly held that an examination of the trial record supports the district court's finding that no actual prejudice resulted.

Petitioner alternatively argues that if the *Mathis* rule is upheld to be applicable by your Honorable Court as the correct standard in determining prejudice in belated appointment cases, then the circuit court erred in finding that petitioner was not actually prejudiced by the late appointment of counsel. Petitioner contends that actual prejudice can be found in the record or that the record is undeterminative on this point and that an evidentiary hearing is essential.

The Commonwealth contends that the circuit court correctly determined that petitioner was not prejudiced after a careful and complete examination of the trial record which demonstrated that petitioner received a fair trial despite the fact that petitioner met his counsel shortly before trial. Mr. Tamburo, who is "an attorney of great experience in the trial of criminal cases" (A. 266-267), effectively provided petitioner with the assistance of counsel at trial.

Petitioner's arguments that his counsel's failure to file pre-trial motions challenging his arrest, the search of the automobile in which he was a passenger, and the seizure of bullets from his home, lack any relevance in determining whether he was prejudiced since counsel was able to enter objections at trial. Counsel did so here, but was overruled on the merits.[6] The district court and the circuit court specifically reviewed this challenged evidence to determine its admissibility despite trial counsel's failure to file timely motions and found that the evidence was properly admitted.[7]

In addition, petitioner has never asserted that he was precluded from presenting any defense witnesses, such as the alibi and character witnesses who testified for co-defendant Lawson.

Petitioner's further claim, raised initially before your Honorable Court, that his counsel did not have an opportunity to confer with counsel for the co-defendants contains no showing that he was thereby prejudiced. Even if petitioner's counsel had known that Lawson was going to take the stand in his own defense and would have to admit to a second degree murder conviction, petitioner's counsel could not have proceeded in any different manner.[8] This fact alone would certainly not have warranted the granting of a motion to sever. It is also immaterial that counsel did not have the notes of the previous trial in order to impeach witness Kovacich, since the alleged "impeaching" merely clarified the amount of money taken by the robbers and in no way cast doubt upon Kovacich's testimony regarding petitioner's complicity.

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[6] See Sections II and III, *infra*.

[7] See Sections II and III, *infra*.

[8] The Record does not show whether in fact petitioner's counsel was or was not aware of this.

With no allegations of petitioner to be resolved the Circuit Court correctly held that an evidentiary hearing was unnecessary under the doctrine of *Townsend v. Sain*, 372 U. S. 293 (1963).

II. The Search of the Automobile in which Petitioner was an Occupant was Reasonable Since It was Conducted Incident to a Lawful Arrest Though Momentarily Later at a Place which Provided Safe Conditions for Police Officers.

A. The record shows probable cause for petitioner's arrest where petitioner fit the description of one of the gunmen and the automobile in which petitioner was riding, which matched identically the description as to style, color and occupants, the automobile seen at the robbery site under suspicious circumstances, attempted to elude police officers.

Petitioner contends that the police officers who arrested him lacked probable cause to do so, citing *Beck v. Ohio*, 379 U. S. 99 (1964). The Commonwealth does not challenge the holding of *Beck*, because clearly here the record shows that the arresting police officers had sufficient probable cause to arrest petitioner.[9] These facts and circumstances were brought out at trial and the trial judge had ample opportunity to rule upon the legality of the arrest.[10]

The record shows that the facts within the knowledge of the *arresting* police officers were as follows:

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[9] The District Court found "that these facts and circumstances formed the basis for probable cause and a legal arrest." 281 F. Supp. at 99-100 (A. 312). The Court of Appeals affirmed the District Court without discussion on this point. 408 F. 2d at 1192 (A. 320).

[10] It is immaterial that petitioner's trial counsel did not file a Motion to Suppress with regard to the arrest since the lower court had ample evidence and opportunity to evaluate the arrest. Consequently, petitioner's right to the effective assistance of counsel was not tampered by the late appointment of counsel in this regard.

On May 20, 1963 at approximately 11:45 P. M., Gulf Service Station attendant Stephen Kovacich was approached by two Negro men on foot at a gas pump island on the station premises in North Braddock, Pennsylvania. The Negro men displayed guns and forced the attendant inside the station office where they ordered him to give them money from the cash register and from a back room (A. 54-55). One of the robbers was wearing a green sweater and the other a light-colored trench coat (A. 57).

At approximately the same time, two young teenage residents of the area were taking a walk (A. 39). They noticed a light blue station wagon parked in a Kroger's parking lot right across the street from the service station (A. 40-42). The automobile was occupied by four Negro men, one of whom was wearing a green sweater and another a light-colored trench coat (A. 43). The teenagers observed the automobile circling the block several times (A. 41). A shout was heard indicating that a robbery had just occurred at the gas station. Immediately thereafter, the teenagers observed the station wagon pull out of the Kroger's parking lot at a high rate of speed, approximately 45 to 50 m. p. h. (A. 41, 52).

Within an hour, Swissvale police officers Herman and Hagan observed a light blue station wagon with four Negro occupants in a neighboring Borough (A. 71, 77). The two police officers were driving separate patrol cars and attemped to stop the station wagon on the main thoroughfare as soon as traffic conditions ma[illegible] the stop feasible and safe. One patrol car, with its red light flashing, came up parallel to the vehicle and attempted to force the vehicle off the road. At this point, the vehicle veered sharply to the right, turning into a side street in an effort to elude police officers. One police officer was able to negotiate the

turn and followed the station wagon to a parking lot at the end of the street (A. 71). The other police officer was able to turn his patrol car at the next side street and arrived at the parking lot within moments (A. 78). When the police officers arrived, the four Negro occupants of the vehicle were already out of the station wagon (A. 72).

Within minutes police officers from Rankin and North Braddock arrived at the scene. Petitioner was observed to be wearing a green sweater; a light-colored trench coat was seen on the seat of the car (A. 86). At this point, the men were patted down for weapons, were taken into custody, and were escorted to various police stations.

The Commonwealth contends that on the basis of the information that a robbery had occurred, that the robbers were Negro men one of whom was wearing a green sweater and the other a light-colored trench coat, of the suspicious actions of the light blue station wagon parked in a nearby lot at that late hour, with the additional facts of the car encircling the block many times and then departing at a high rate of speed in a residential area immediately after the robbery, that two of the occupants matched the description of the robbers, and an automobile matching this description wherein the petitioner was a passenger attempting to elude police officers establishes clearly that the police officers had probable cause to make an arrest of the petitioner. In addition, petitioner's physical coloring and attire matched perfectly the description given by the hold-up victim.

The Commonwealth does not contend that an arrest was not made until the petitioner was taken to the police station or until after the fruits of the crime or weapons were found or that the apprehension at the parking lot was a

mere "stop" rather than an arrest as was argued in *Terry v. Ohio*, 392 U. S. 1, 88 S. Ct. 1868 (1968).

Rather, the Commonwealth concedes that the arrest took place at the parking lot after the police officers approached the occupants of the eluding vehicle and searched their persons for weapons. The arrest occurred when North Braddock police officers investigating the robbery took the petitioner into custody moments later.

Clearly, petitioner was entitled to the protection of the Fourth and Fourteenth Amendments at this moment, the moment the arrest was made. *Beck v. Ohio, supra.* The reasonableness, however, of the government's invasion of his personal security in this particular situation is amply based upon and supported by the facts set forth above.

Petitioner alleges that there was no information connecting the automobile to the robbery and that when he was apprehended, the automobile in which he was a passenger was heading in the direction of the robbery. The Commonwealth contends that while arresting police officers had no direct and positive evidence that the robbers escaped by means of this particular automobile, the extremely suspicious actions of an automobile at the scene of the robbery matching the description of the apprehended vehicle raised inferences which conscientious law enforcement officers could not ignore. Most important, the description of the robbers given by the holdup victim as to coloring and dress identically matched one of the automobile's occupants, petitioner. It is immaterial that the automobile was heading in the general direction of the robbery site since the Commonwealth does not now, nor did it at trial, contend that the occupants were attempting to escape when first

spotted by Swissvale police.[11] It was the Commonwealth's theory at trial that since approximately one hour had elapsed between the robbery and the apprehension, the occupants were not in the process of escape but were returning to their homes.

The only factual consideration is whether at the moment of arrest the police officers had within their knowledge reasonably trustworthy information to warrant a man of reasonable caution in the belief that a robbery had been committed and that petitioner was indeed the man who had committed the robbery. *Carroll v. United States,* 276 U. S. 132, 162 (1965); *Beck v. Ohio, supra; McCray v. Illinois,* 386 U. S. 300, 304 (1967).

Swift action was mandated here in an attempt to prevent the escape of the robbers and the destruction of what is both the evidence of petitioner's guilt and the property of the gas station.

The lower court correctly held that there was probable cause for petitioner's arrest.

B. The search of the vehicle and seizure of the instrumentalities and fruits of the crime found therein were reasonable since the search was conducted incident to a lawful arrest.

Petitioner challenges the admission into evidence of items found in an air vent on the passenger side of the automobile beneath the dashboard, claiming that the search which uncovered these items was unreasonable. The items in question[12] which were identified at trial were two re-

[11] The automobile was not apprehended in the close proximity of the gas station. When stopped, the vehicle was merely heading in the overall general direction of the Borough in which the holdup had occurred (A. 75).

[12] Although the decision of the Circuit Court discusses only the two revolvers found in the automobile, it is assumed that all of the items seized at the same time and which were identified at trial were intended to be included in the decision.

volvers, a glove full of change in the amount of $34.79, several driver's licenses, operator's licenses and various other cards.

Initially, the Commonwealth wishes to point out that it is not challenging the standing of petitioner to contest the lawfulness of the search. While the evidence shows that petitioner was neither the owner or the driver of the vehicle, the record affirmatively establishes that he was a passenger. The Commonwealth will assume arguendo that petitioner has standing to challenge the search and will limit its argument to the reasonableness of the search.

The record shows that petitioner's arrest occurred at approximately 12:30 A. M. in a parking lot at the end of a street. Also taken into custody were three other occupants of the vehicle who were suspected of participating in an armed robbery less than an hour before. Police officers frisked petitioner and his companions for weapons.

No actual search of the automobile was conducted at this time. Police officers merely looked inside the windows of the vehicle (A. 79). If any search of the vehicle is said to have occurred at this time, then the "search" can only be characterized as an open view visual check of the station wagon in a dark parking lot in the middle of the night.

Because of the dark lighting and surroundings and because of the great risk of escape and the danger to the safety of the police officers, the decision was made to transport the four men to the police station separately and to search the automobile at the police station where better lighting was available (A. 87). Co-defendant Lawson, the admitted owner of the vehicle, drove the automobile to the police station, accompanied by petitioner and a police officer, and parked the vehicle in the station driveway (A. 89).

Immediately upon the arrival of the vehicle at the police station Officers Wagner and Cassidy began to search the vehicle. For an apparently unexplained reason, the search was momentarily interrupted. The police officers entered the station for a very short period of time and then returned to continue the search. At this time the officers discovered the items in question secreted in the air vent duct (A. 90, 107).

The Commonwealth earnestly contends that the legality of the search must be sustained as it was conducted incident to a lawful arrest. *Ker v. California*, 374 U. S. 23 (1963). The Commonwealth contends that only one search of the vehicle was actually conducted. This search occurred at the police station while the car was parked in the station driveway. It is immaterial that the search was interrupted and the items found during the second half of the search. Only one search occurred despite the brief interval while police officers entered the station.

If the search is incident to a lawful arrest, then petitioner's objection that the searching officers did not obtain a warrant is without merit. Since the Fourth Amendment's protections are applicable here, *Mapp v. Ohio*, 367 U. S. 643 (1961), police officers must obtain a warrant whenever practicable: *Katz v. United States*, 389 U. S. 347 (1967), *Beck v. Ohio, supra*. However, the Commonwealth contends that the necessity of swift and safe police action in view of the time of night of the arrest and the dark surroundings warranted the search at the police station as incident to the lawful arrest.

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Cooper v. California*, 386 U. S. 58, 62, 87 S. Ct. 788 (1967),

citing *United States v. Rabinowitz*, 389 U. S. 56, 66, 70 S. Ct. 430, 435.

Nonetheless, the search must stand the test of reasonableness. The Commonwealth maintains that the search meets this test since it took place substantially at the time of the arrest and while it did not take place at the location of the arrest, emergency circumstances necessitated that the search be held at a well-lighted area which was safe for police officers.

Petitioner's contention rests upon *Preston v. United States*, 376 U. S. 364, 84 S. Ct. 881 (1964). The Commonwealth maintains that *Preston* is not controlling. The Court of Appeals agreed with this position.

Preston can be distinguished from the facts of the instant case. Preston was arrested on a minor charge of vagrancy and the offense charged did not bear any reasonable nexus to the search of his automobile. In addition, the vehicle was searched long after it was taken to the police station. The Commonwealth contends that the time difference in *Preston* and in the instant case is important in this regard: that the short lapse of time between the arrest and search in the instant case is indicative that the search occurred "incident" to the arrest.

As regards the place where the search was made, the police station, the Commonwealth contends that the police station area was the only place where the search could have been conducted safely. After the arrest, Lawson, accompanied by petitioner and a police officer, drove the automobile to the station. At trial, Lawson stated that the dimly-lit parking lot where they were apprehended adjoined a bar where their friends met (A. 171). Certainly, the police officers could have been placing their lives in danger if they attempted to search the vehicle at

the parking lot, not only danger from petitioner and his companions, but from their friends inside the bar. While it is true that the petitioner did not have ready physical access to the automobile while it was being searched at the police station, this factor alone is insufficient to prove the search unconstitutional. See Mr. Justice White's dissenting opinion in *Chimel v. California,* 395 U. S. 752, 89 S. Ct. 2034 (1969).

The Commonwealth urges that your Honorable Court approve the principles of *United States v. Dento,* 382 F. 2d 361 (3rd Cir. 1967), *cert. denied,* 389 U. S. 944, 88 S. Ct. 307 (1967), upon which the District Court and the Circuit Court relied.

Dento deals with the search of a car made at a New Jersey State Police barracks following the defendant's arrest on a main highway. For reasons of safety and convenience, the State Police drove the car from the highway to their barracks before searching it. The evidence seized in that search was counterfeit bills and the crime involved was attempting to pass counterfeit bills. The search was held to be incident to a lawful arrest. *Cf. United States v. Bennett,* 415 F. 2d 1113 (6th Cir. 1969).

Wood v. Crouse, 417 F. 2d 394 (10th Cir. 1969), which petitioner cites, abandons the reasonableness test in forcing police officers either to search the automobile in dangerous circumstances or to secure a search warrant before conducting any perusal.

The instant case parallels *Dento.* Petitioner was arrested within an hour of his having committed an armed robbery. The arresting officers frisked the petitioner and the other occupants of the car. Since they did not find any weapons on the felons, they reasonably believed them to be concealed in the car. Since it was dangerous

for the officers to search the car at the scene of the arrest, there being four suspects to be guarded in a dark parking lot, the car was driven by its owner to the police station where it was searched and the evidence found. Surely the officers were justified in taking reasonable safety precautions which necessitated moving the car. These precautions should not render unconstitutional a search otherwise reasonable and incidental to the arrest.

The Commonwealth urges your Honorable Court to disregard *Wood* in a determination of the instant case and to affirm the principles of *Dento*.

III. The Admission into Evidence of Revolver Shells Seized in Petitioner's Apartment During a Search Conducted Pursuant to a Warrant which did not List Shells as Being Among the Items to be Seized was Legal or Alternatively, Constituted Harmless Error.

The petitioner contends that .38 caliber bullets found during a search of his apartment should not have been admitted into evidence since the warrant did not list bullets as being among the items to be located. An objection was raised by defense counsel at trial on this basis. This objection was overruled by the trial judge because he found that there was reasonable ground for making a search in addition to the failure of defense counsel to file a timely motion to suppress the evidence (A. 130-131).

The record discloses that at 9:30 A. M. on May 21, the day of the arrest, North Braddock police officer James Heverly received a search warrant authorizing a search of petitioner's home (A. 126). Officer Heverly located one brown leather holster and a box of .38 caliber Smith and Wesson shells containing 33 shells of the short variety. In addition, approximately 45 additional shells of the long

variety, .38 caliber, were located. Many of these shells were of the dum-dum variety, which according to Officer Heverly cause a larger hole upon exit than upon entry (A. 128). This simple explanation was given solely for the purpose of clarification and could not be deemed inflammatory or prejudicial per se. Officer Cassidy then identified bullets which he located in the revolvers found inside the automobile in which petitioner had been a passenger prior to arrest. He identified four .38 long dum-dum bullets and two empty long cartridges, and five .38 caliber short bullets (A. 132-133).

Unfortunately, the search warrant and supporting affidavit, which were available at trial, have been lost and were not introduced at either the State or Federal habeas corpus hearing. The Commonwealth concedes as it did before the Court of Appeals, that the warrant did not list the bullets as being among the items to be located (TT. 203). However, the Commonwealth maintains that the seizure of the bullets was lawful or alternatively that the admission of the revolver shells into evidence constituted harmless error.[13]

The Appellate Courts of Pennsylvania and the United States Court of Appeals for the Third Circuit have long held that items related to the purpose of the search may be seized even though not specifically named in the warrant. *Commonwealth ex rel. Stoner v. Myers*, 199 Pa. Superior Ct. 341, 345, 185 A. 2d 806, 808 (1962), *allocatur denied; United States v. Joseph*, 174 F. Supp. 539 (E. D. Pa. 1959), *aff'd per curiam*, 278 F. 2d 504 (3rd Cir.), *cert. denied*, 364 U. S. 823 (1960); *United States ex rel. Stoner v. Myers*, 329 F. 2d 280 (3rd Cir. 1964); *United States ex rel. v. Banker v. Maroney*, 210 Pa. Superior Ct.

[13] The Court of Appeals (A. 332) and the District Court (A. 312) held to this effect, relying upon *Chapman v. California*, 386 U. S. 18 (1967).

702, 231 A. 2d 323 (1967), *allocatur denied.* See also *United States v. One 1965 Buick,* 992 F. 2d 672, 679 (6th Cir. 1968); *Gurleski v. United States,* 405 F. 2d 253 (5th Cir. 1968), *cert. denied,* 395 U. S. 981 (1969).

The warrant specifically identified articles taken in the armed robberies which the officers were investigating. The .38 caliber bullets were intimately related to the offenses charged, to armed robbery.

The search conducted was not a general search such as those condemned in *Berger v. New York,* 388 U. S. 41, 87 S. Ct. 1873 (1966), *Stanford v. Texas,* 379 U. S. 476, 85 S. Ct. 506 (1964) and *Marron v. United States,* 275 U. S. 192, 48 S. Ct. 74 (1927).

Assuming arguendo that the revolver shells were improperly admitted into evidence, the Commonwealth contends that the admission of these bullets was harmless error. This conclusion is amply supported by the record, which indicates that petitioner's guilt is clear and convincing. Petitioner was positively identified in court by the victim as one of the two robbers, and the one who brandished a nickel-plated .38 caliber revolver. The victim was a former police officer and he was able to identify one of the guns found in the car in which petitioner was a passenger as appearing to be the gun that was used in the robbery of his gasoline station.

The victim had a good opportunity to observe closely the facial features of the robber. The victim testified that he identified petitioner at a lineup approximately one week after the robbery. Various cards, such as an operator's license, were identified by the victim as having been taken from him during the robbery.

With regard to the robbery which occurred May 20, 1963, the victim testified that one of the robbers was wear-

ing a green pullover sweater. The victim identified petitioner as one of the robbers the day after the robbery but was unable to make a positive identification at trial because, as the victim explained, petitioner was dressed differently, was now wearing glasses and had shaved his mustache (A. 79). Petitioner was apprehended less than an hour after the robbery in a light blue station wagon which matched the description of the station wagon which had been seen circling the area shortly before the robbery under suspicious circumstances. One of the occupants of the car was wearing a green sweater. A search of the automobile in which petitioner was a passenger revealed the presence of a glove used to carry change from the gas station and guns which were identified by the victim as resembling the robbers' guns.

In light of the extensive testimony of eye-witnesses that petitioner had participated in various armed robberies, it certainly cannot be seriously contended that his conviction rested upon the admission of the .38 caliber bullets located at his home.

Your Honorable Court has considered the harmless error doctrine in light of the proscription of the Fourth Amendment. *Bumper v. North Carolina,* 391 U. S. 542, 88 S. Ct. 1788 (1968). The Appellate Courts of Pennsylvania and various Circuit Courts have applied the harmless error rule in cases involving the Fourth Amendment. *Commonwealth v. Pearson,* 427 Pa. 45, 233 A. 2d 552 (1967), *United States v. Ramseur,* 378 F. 2d 902 (6th Cir. 1967); *Thompson v. United States,* 382 F. 2d 390 (9th Cir. 1967).

Therefore, it is the Commonwealth's contention that if the search is held to be illegal, the admission of the shells is merely harmless error in light of the overwhelming evidence of petitioner's guilt.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

APR 13 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

against

JAMES F. MARONEY, Superintendent, State Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 830

FRANK CHAMBERS,

Petitioner,

against

JAMES F. MARONEY, Superintendent, State Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus*

This brief is limited to issues arising from petitioner's claim that he was denied the effective assistance of counsel by virtue of the alleged late appointment of counsel to represent him at his trial for robbery in Pennsylvania.

As the chief legal officer of the State of New York (New York Executive Law § 63), the Attorney General is concerned with rules governing the assignment of counsel to

indigent defendants and has in the past initiated and sponsored legislation to insure the effective representation of the State's criminal defendants.* We believe that the rule adopted below, creating a presumption of the inadequacy of counsel by virtue of the closeness of time between assignment and trial, is unwarranted and unwise (Point I, *infra*). The Attorney General moreover is charged with the defense of respondents in habeas corpus proceedings brought by state prisoners and is, therefore, concerned about the proposed retroactive adoption of a procedural rule for the state courts which alters the historical and statutory role of habeas corpus without advancing any legitimate interests of state prisoners (Point II, *infra*.)

Although we do not question the result below, we believe that it embodies an erroneous rule with disturbing ramifications not only for the standards by which counsel is to be judged but also for the function of federal habeas corpus with respect to state prisoners. Accordingly, we file this brief *amicus curiae* pursuant to Rule 42 of the Rules of this Court.

POINT I

The effectiveness of the assistance of counsel to a criminal defendant must be judged in light of the record as a whole and not exclusively by the amount of time elapsing between the assignment of counsel and trial.

"[T]he Constitution nowhere specifies any period which must intervene between the required appointment of coun-

*See N. Y. County Law, §§ 722-722-f (Laws of 1965, c. 878) requiring every county to provide and pay counsel for indigents charged with crimes, misdemeanors as well as felonies. The law also requires the counties to provide expert, investigative and other services necessary for an adequate defense.

sel and trial. . . ." *Avery* v. *Alabama*, 308 U. S. 444, 446. The Court below and at least one other Court of Appeals have nevertheless promulgated, by way of habeas corpus, a rule isolating as a factor in the assessment of due process, the amount of time elapsing between the assignment of counsel and trial and have elevated the effect of a short period of time into a presumption that counsel was ineffective. See, *e.g.*, United *States ex rel. Mathis* v. *Rundle*, 394 F. 2d 748 (3rd Cir. 1968); *Turner* v. *Maryland*, 318 F. 2d 852 (4th Cir. 1963); *Twiford* v. *Peyton*, 372 F. 2d 670 (4th Cir. 1967). Petitioner attempts to carry this rule one step further by maintaining that the assignment of counsel close to trial is so inherently prejudicial that prejudice in fact need not be shown, or, rather, that the State can never show the absence of prejudice.

Both of these rules confuse the absolute right to have sufficient time within which to prepare for trial with the relative nature of the assessment of sufficiency. Certainly, "a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." *Powell* v. *Alabama*, 287 U. S. 45, 59.

However, whether or not time is sufficient for competent, conscientious counsel to provide adequate representation in a due process sense depends, in turn, on a variety of other factors. These include for example, the complexity of the facts, the need to research the law applicable to the charge, whether or not a defense exists, whether defense witnesses exist and are available, and whether or not it is desirable to make pre-trial motions going to the sufficiency of the indictment or to admissibility of evidence. They also include other work which must be handled by counsel and his efficiency and experience. A case may have to take account of all of these factors or none.

Even a defendant with no defense has the right to put the prosecution to its proof. But the time necessary for

preparation will be no more than that required to ascertain that fact. The taking of too much time before trial may well deny a defendant, particularly a jailed defendant, his right to a speedy trial. The adequacy and the amount of time available for and consumed in trial preparation, thus, cannot be judged except in relation to each individual case, the very concept rejected by the Court below. *United States ex rel. Mathis* v. *Rundle, supra* at 750. A few minutes may be adequate preparation in some cases (*Williams* v. *Beto,* 354 F. 2d 698 [5th Cir. 1965]; *United States* v. *Wight* 176 F. 2d 376 [2d Cir. 1949]; several days may be inadequate in others (*Brooks* v. *Teaxs,* 381 F. 2d 619 [5th Cir. 1967]).

The rule that a short period of time between the assignment of counsel and trial creates a presumption that counsel is ineffective stems from the concern by the Fourth Circuit Court of Appeals with a local Virginia practice of delaying the assignment of counsel for arrested defendants until shortly before trial (see *e.g., Fields* v. *Peyton,* 375 F. 2d 624, 628 [4th Cir. 1967]; *Coles* v. *Peyton,* 389 F. 2d 224 [4th Cir. 1968]) and from concern about the practice of some counsel of delaying speaking to their clients. *Turner* v. *Maryland,* 303 F. 2d 507 (4th Cir. 1962); *Braxton* v. *Peyton,* 365 F. 2d 563, 564 (4th Cir. 1966).

While the problems created by late appointment and late consultation are genuine, the power of the federal courts to alter state practices as a supervisory matter is limited (see Point II, *infra*). The rule announced below is such a supervisory rule. It undertakes to direct courts in the control of their calendars and attorneys in the control of their caseloads. It fails, moreover, to take account of cases involving the operation of local defender organizations in which information may flow freely among attorneys as to the facts of the case but the assignment of a trial attorney by the organization may occur shortly before the trial even though the case has been investigated and, as

here, even previously tried by an associate of the trial attorney.*

As a constitutional matter, it should not be relevant whether the shortness of time is attributable to the State in delaying the assignment of counsel or to counsel in delaying preparation. The problem of the degree to which the court is to supervise assigned counsel is inherent in both situations. Direct supervision is not only difficult but might well violate the client's right to counsel by direct intervention into that relationship.

Once counsel is assigned the activity which he undertakes in behalf of his client is largely a matter between attorney and client. As the Fifth Circuit Court of Appeals has said:

> "'[W]hen a defendant requests the appointment of counsel he is simply seeking the benefits of the attorney client relationship as customarily practiced in the American system of jurisprudence, no more and no less.'" *Williams* v. *Beto, supra* at 705.

Direct inquiry by a court into the manner in which a case is prepared by an attorney who has been appointed according to some accepted practice may well be regarded as an interference with the attorney-client relationship. And, particularly, where no protest is made to the court that the time in which to prepare the case has been inadequate, no reason appears for the court in inject itself into that relationship.

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* Also involved is the problem of an attorney who is belatedly substituted to represent a defendant either because of a disagreement with prior counsel or for delay itself. A court must move as expeditiously as possible and must not be deprived of the discretion to control its calendar. It may well be necessary for a court to force a reluctant defendant to trial even over protest that the time in which to prepare for trial has been inadequate.

For the same reasons, the standards by which the performance of counsel is to be assessed should not be one which requires minute inquiry into what counsel has done or one which presumptively invalidates the performance of counsel. Representation should not be held inadequate unless it is "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." *Williams* v. *Beto, supra* at 704; *Diggs* v. *Welch,* 148 F. 2d 667, 670 (D. C. Cir. 1945), *cert. denied* 325 U. S. 889. The courts have interpreted this to mean that the representation afforded by counsel must be seen to be a "farce and a mockery of justice" which "shocks the conscience of the court". *Williams* v. *Beto, supra; United States* v. *Garquilo,* 324 F. 2d 795 (2d Cir. 1963); *Diggs* v. *Welch, supra* at 669.

This rule, which is widely applied in the United States, creates a workable standard which both protects a defendant's right to counsel and also protects the reputation of counsel and the conviction itself against the disgruntled assertions of hindsight. The standard that the trial be a "farce and a mockery of justice" which should come to the attention of the Court before counsel will be deemed inadequate is absolutely essential to the orderly administration of the courts. First, it creates a presumption in favor of the competence of counsel which should attach to an attorney appointed by an acceptable method. Second, it obviates the necessity for second-guessing an attorney's handling of a case. It has been repeatedly pointed out in this connection that a defendant is not entitled to flawless counsel but to professional counsel behaving in a responsible manner. Most important it maintains the discretion of the trial judge to control his court while insuring that any error be curable at the crucial time, the trial itself. If the error is such that it comes to the attention of the Court, he can correct it, thus protecting both the prosecution from later vacating of the judgment and the defendant from an unconstitutional conviction for which he must await collateral redress.

By contrast, a presumption that counsel was ineffective would magnify any claimed error or disagreement with the judgment of counsel into a constitutional defect simply by attributing it to the lack of time in which to prepare. It would invite profitless speculation as to whether or not a trial might have been conducted differently but for the asserted lack of time. Aside from the unfairness to trial counsel of such minute inquiry, it would require the State to rebut such speculation perhaps even to the point of producing witnesses claimed to have existed many years before.

The traditional approach employed by the Fifth Circuit in *Williams* v. *Beto, supra,* which considers all the circumstances in arriving at a determination of whether or not due process was denied. This is a more realistic approach to the issue and is far superior to the bifurcated approach which presumes that counsel was ineffective and then embarks on an inquiry into harmless error by studying the record and determining either that the trial could not have been better conducted or that the trial could have been better conducted, but the outcome would be the same. A concrete comparison of the operation of the two rules clearly illustrates the superiority of the more general rule.

In *Brooks* v. *Texas,* 381 F. 2d 619 (5th Cir. 1967), the defendant was charged with a rape to which the only possible defense was insanity. Counsel was assigned considerably before trial, but spoke to his client only on the Friday before the Monday on which trial began. Counsel's failure to allow sufficient time within which to prepare his defense meant that his subpoena of the doctor who had examined his client came too late to secure the doctor's attendance; it meant that he could secure no other medical evidence; it meant that he did not secure and study the reports available and it meant that his cross-examination of the witness testifying about those reports was inadequate and inept. Counsel's floundering

at trial amounting, as the Court said, to "desperation and remorse" made the proceeding "a mockery of justice" which the trial court should have taken steps to correct. *Brooks* v. *Texas*, *supra* at 625.

In *Twiford* v. *Peyton*, 372 F. 2d 670 (4th Cir. 1967), the Court, while unequivocally expressing confidence in the competence of the assigned attorney in that case, held that the appointment of counsel only on the day before trial invalidated that trial. It was undisputed that on the day of his assignment, counsel talked to his client, reviewed the charges against him, determined that there were no witnesses to be called in his behalf, talked to the police witnesses, learned the names of all prosecution witnesses, learned about certain fingerprint evidence, discussed with his client the possibility of a guilty plea and learned that his client did not wish to plead guilty and was ready for trial. The following day, however, as counsel was about to answer ready when the case was called, petitioner requested him to ask for a continuance in order to obtain a witness who would impeach the chief prosecution witness by showing that he was biased. Counsel asked for such a continuance although he could not assure the Court that the witness would be material or would be available at a later date. The motion was denied.

Some ten years later in his State habeas corpus application, petitioner alleged for the first time that this witness would also have been an alibi witness. He apparently did not allege that he had told his lawyer that fact on the day of trial or on the day before trial. Yet, if the defendant claimed that he was not present at the time the crime was committed, that that would have been the first thing he would have told his attorney. There was no suggestion that he had ever said that. The Fourth Circuit coupled the late appointment of counsel and "the denial of a continuance when he had the first intimation of some semblance of a defense" (*Id.* at 673) into a finding of inadequacy.

However, it is abundantly clear from the consideration of the totality of the circumstances of that trial that the defense was not rendered ineffective by the lateness of the appointment. It is clear that counsel was not informed that the potential witness was an alibi witness and it is equally clear that the rules of evidence would have made her testimony as to bias inadmissible or at least remote. Any bias could have been demonstrated by cross-examination of the prosecution witness himself and not by introduction of another witness to impeach the prosecution witness on an issue collateral to the issue at trial. It was indeed contradictory for the Court so extravagantly to praise the ability of trial counsel and, at the same time, to ignore the fact that although he did move perfunctorily for a continuance, he did not assert that he was unready to proceed with the trial. Cf. *Avery* v. *Alabama*, *supra*.

The Court then insisted that the presumption it had created with respect to a thirteen year-old case made it incumbent on the State to produce this alleged witness. Without that witness, the conviction was held invalid. The notion that States must pursue aging will-o'-the-wisps to save its convictions is repugnant to the very essence of orderly proceedings, especially collateral proceedings.*

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* The *Twiford* case is remarkable for one other feature. It relied for its decision on the State court hearing at which neither side introduced the testimony of the alleged witness. It is not clear why the defendant did not do so but the state, under the law at that time, was certainly not required to do so. The Fourth Circuit held that because of the presumption existing in the federal courts, the State was required to produce this witness at a State hearing and that its "failure to do so leaves the inference of prejudice, which must be drawn from the proof, unchallenged" (*Id.* at 673). The Court did not even afford the State the opportunity to present evidence at a federal hearing governed by what it considered to be the appropriate standard of proof. But see *Townsend* v. *Sain*, 372 U. S. 293 (1963).

It is abundantly clear from the foregoing that the presumption created by the Court below is an inappropriate method for determining the effectiveness of counsel. It must also be pointed out that it results in analytical confusion which, while it will not change the result in most cases, is unnecessary to a correct resolution of those cases and creates the anomalous situation of sanctioning counsel which is presumed to be ineffective. The analytical difficulty with the rule below is well illustrated by *United States ex rel. Mathis* v. *Rundle, supra.* In that case, which adopted the Fourth Circuit rule for the Third Circuit, the Court first deplored the resolution of cases "on a case-by-case basis." *Id.* at 750. After tracing the development of the rules governing the assessment of the adequacy of counsel and then turning to the facts of the case, it noted that the attorney, a member of a defender organization, and familiarized himself with the case and had called witnesses, some of whom came and some of whom did not. The attorney declined a continuance stating that he thought the missing witnesses would be of no help. He was "unable to say that he had been insufficiently prepared to go to trial." (*Id.* at 753). The Court then said that the case:

> "reaches very close to, but does not attain, the stage where prejudice to the defendant inherent in appointed counsel's unpreparedness renders it incumbent upon the state to rebut the presumption of actual harm caused by tardy appointment." (*Id.* at 753).

In other words, the record disclosed no prejudice by the late appointment and, therefore, the presumption of prejudice did not have to be rebutted. However, of course, the same evidence which disclosed no prejudice was the evidence which would have been used to rebut prejudice and the Third Circuit, at least, stated one rule but followed another. But it is very clear that the Court below regarded its rule as being one of substantive impact and that the impact it can have is detrimental.

Petitioner in this case argues that he was without counsel during a critical stage of the proceedings, to wit, the time within which pretrial motions could have been made. He, thus, seeks to alter the thrust of the decision below which held counsel to be tardily appointed and presumptively ineffective but not, in fact, ineffective because the pretrial motions which should have been made also should have been denied. As we have said, this is a case involving a defender organization. It seems clear that petitioner had long been represented by this organization which had previously tried the same charge against him, the result being a mistrial. It is also clear, as the trial judge pointed out to defense counsel, that counsel was aware of the existence of the evidence which he sought to challenge belatedly (A. 82, 130-31).

If there is any problem in the case, it has to do not with any lack of time between the assignment of counsel and trial, but with a misunderstanding by counsel as to the admissibility of evidence which had been excluded from the first trial. Whether or not this misunderstanding, if such it was, would preclude a finding of waiver of the objection has no bearing on whether or not counsel was effective. See *Henry* v. *Mississippi*, 379 U. S. 443. Since counsel was aware of the evidence, he certainly cold have attempted to make the motion before trial actually commenced. The other speculations raised about what counsel might have done are just that and, especially in view of the previous trial, nowhere support a finding that had counsel had more time to prepare the case, he would have handled things differently.

POINT II

New procedural rules governing state trials should not be announced retroactively by way of habeas corpus.

Even if it be assumed *arguendo* that new rules are necessary to insure the effective assistance of counsel to crim-

inal defendants, such rules should not be announced retroactively by way of habeas corpus. But clearly the Third and Fourth Circuits were primarily interested in promulgating just such supervisory rules. Thus, in *Twiford* v. *Peyton, supra* at 673 the Court said:

> "[W]e have on occasion found that the effective assistance of counsel was not denied, notwithstanding the late time of appointment or lack of preparation of counsel where the record showed affirmatively that an accused was not prejudiced thereby. In doing so, we have implied that these deplorable practices are inherently prejudicial . . .".

And in *Fields* v. *Peyton, supra* at 628 the Court considered the late appointment of counsel and held that "the procedure, however, is no longer satisfactory . . .".

In *United States ex rel. Mathis* v. *Rundle, supra* at 753-54, the Third Circuit stated that:

> "The hopeful practical consequence of our rule thus enunciated will be that states and their judicial systems in the Third Circuit will become more careful in permitting appointed counsel to fulfill in a more realistic manner the function which they should have been responsibly assuming all along."

While an individual state defendant's rights do concern the lower federal courts, matters of procedural rules generally do not. Such rules should be announced only by the state courts themselves or by this Court. See, *e.g.*, *Miranda* v. *Arizona*, 384 U. S. 436. Any other procedure is a direct breach of the comity which is constitutionally required between the State and Federal courts.

The lower federal courts cannot prescribe procedural rules, especially dealing with such questions as presumptions and burdens, for future state court cases. They certainly cannot do so for past cases. Their concern is with

due process. Certainly the rights to counsel, including effective counsel is retroactive, but, as we have said in Point I, the federal courts cannot make a relative concept, adequacy of time in which to prepare for trial, into an absolute and declare *that* retroactive. Cf. *Stovall* v. *Denno*, 388 U. S. 293. If specific rules are to be formulated they must be for the future so that state courts can implement them. Past cases are protected by the due process standard and new rules need not apply to them to vindicate any established rights. See *Johnson* v. *New Jersey*, 384 U. S. 719.

Strict rules are, of course, very difficult in this area (Point I, *supra*), because many factors must be taken into account. A fixed time period may delay a speedy trial or it may hamper preparation. See *Goldberg* v. *Kelly*, —— U. S. ——, 38 U.S.L. Week 4223 (March 23, 1970). It is perhaps for this reason that the Court of Appeals below limited itself to creating a presumption that counsel was ineffective and shifted the burden of proof to the State. However the burden of proof in a habeas corpus proceeding is on the petitioner to show facts which would entitle him to the relief requested. *Townsend* v. *Sain*, *supra*. Since a short period of time is not a sufficient fact to entitle petitioner to relief (*Avery* v. *Alabama*, *supra*) the burden cannot be shifted by the allegation of that one fact. The courts of Pennsylvania have adopted a constitutionally acceptable standard for measuring the effectiveness of counsel (*Commonwealth ex rel. Washington* v. *Maroney*, 427 Pa. 599, 235 A. 2d 349 [1967]). and it is inappropriate for a circuit court to set a different standard in order to encourage a better practice.

CONCLUSION

The rule that a short period of time between the assignment of counsel and trial creates a presumption that counsel was ineffective should be rejected by this Court.

Dated: New York, New York, April 10, 1970.

Respectfully submitted,

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